

## CHARLOTTE BUSINESS INCLUSION PROGRAM

The Charlotte Business Inclusion (“CBI”) Program seeks to develop and grow small businesses in the Charlotte area, and to remediate the effects of discrimination against minority and women-owned firms that has adversely affected their ability to participate in City contracts. The Program is divided into 7 Parts:

**Part A:** Background and Administration

**Appendix 1 to Part A:** Definitions

**Part B:** Construction and Commodities Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE and MWBE Certification

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

Unless otherwise indicated, capitalized terms used in the CBI Program are defined in Appendix 1. If you have any questions about the CBI Program, please contact the CBI Office at 704-336-3380.

### **Part A Background and Administration**

#### **Section 1: Program Overview and Scope**

##### **1.1. Program Findings and Background:** The Charlotte City Council makes the following findings:

- The City of Charlotte has a long history of creating and implementing strategies to remedy discrimination and to support and encourage local business growth at all levels.
- In October 1993, D.J. Miller & Associates completed a disparity study at the City’s request, finding discrimination against minority and women businesses in City contracting. Following the study the City adopted a Minority and Woman Business Development (MWBD) Program, which remained in effect until January 2002. In January 2002 the Charlotte City Council terminated the race and gender conscious components of the MWBD Program in response to a lawsuit challenging its constitutionality.
- Immediately after terminating the race and gender conscious components of the local MWBD Program, the Charlotte City Council appointed a Stakeholders Committee of citizens to study alternatives to the MWBD Program. Through a process that included gathering information from other municipalities, private sector experts and a public hearing, the Committee examined the challenges facing Charlotte’s minority and woman owned business community.
- In June 2002, the Stakeholders Committee made a number of recommendations to the Charlotte City Council. These recommendations included the following components aimed at helping small businesses obtain access to capital and access to markets:
  - Developing a small business center/virtual business center;
  - Training and continuing education initiatives;
  - Increasing access to equity and working capital through a loan fund;
  - Developing a goal based, good faith efforts small business enterprise utilization program;
  - Reviewing and revising City contracting and procurement processes; and
  - Conducting small business outreach.
- In July 2002, City Council directed the City Manager to begin the process of implementing the Stakeholders Committee’s recommendations. In January 2003, City Council adopted the original version of the Small Business Opportunity Program (SBO Program) to implement the following two Stakeholders Committee’s recommendations: (a) developing a goal based, good faith efforts small business utilization program, and (b) conducting small business outreach. The SBO Program went into effect in March, 2003, and was amended by City Council in September 2003 based on a series of public input sessions and feedback. Additional revisions were made in September 2004, March 2007, and August 2009. The remaining recommendations of the Stakeholders Committee were implemented independent of this Program.

- While the SBO Program was being developed, the City of Charlotte retained MGT of America, Inc. to conduct a disparity study to examine the utilization of minority and women owned firms on City contracts and determine if any disparities found were due to marketplace discrimination. MGT completed the study in December 2003 (the “2003 Disparity Study”), finding that marketplace discrimination had occurred and continued to occur against minority and women owned firms, both in City contracting and in the private sector. On the advice of MGT, the City attempted to remedy the discrimination found in the 2003 Disparity Study through the race and gender neutral SBO Program. The City devoted considerable additional resources to staffing for the SBO Program, and vigorously enforced the Program from 2003 through adoption of the CBI Program, rejecting non-compliant low bids from contractors on at least fourteen occasions.
- In 2010 the City retained MGT to conduct a second disparity study, this one to (a) determine whether disparity exists between the number of MWBE firms available to perform on City contracts and the City’s utilization of these firms; (b) determine the extent to which any disparities found are attributable to discrimination; and (c) recommend modifications to the SBO Program to remedy the effects of any discrimination identified.
- In connection with that study, City Council established a Disparity Study Advisory Committee to assist with community outreach, provide input to MGT as needed and review and comment on MGT’s findings and recommendations.
- MGT completed the second disparity study in September 2011 (the “2011 Disparity Study”), finding that disparities continued to exist between the availability and utilization of minority and women owned businesses (“MWBEs”), both in City contracting and in the private sector. However, MGT did not recommend adoption of race and gender conscious measures at that time because: (a) utilization of minority and women firms significantly increased under the SBO Program; and (b) the disparities found in the 2011 study were in large part due to greater MWBE availability in recent years; (c) the SBO Program was more effective than the City’s prior MWBE Program and other race and gender conscious programs in remediating disparity; and (d) the anecdotal evidence linking disparity to discrimination in the 2011 Disparity Study was not as dramatic as in some instances where race and gender conscious programs have been upheld.
- Following MGT’s presentation on September 26, 2011, Council referred the matter to the Economic Development Committee for review.
- On questioning from the Charlotte City Council, the Economic Development Committee and the Disparity Study advisory committee, Dr. Vince Eagan with MGT acknowledged that the SBO Program had not been successful in fully eradicating disparities in the availability vs. utilization of minority and women-owned firms, and that there was anecdotal and other evidence linking such disparities to discrimination. He further acknowledged that non-minority firms were disproportionately benefitting from the SBO Program.
- After further review of the Disparity Study and questioning of Dr. Eagan, the Economic Development Committee recommended that the City retain Franklin Lee of Tydings & Rosenberg, LLC to review the methodology, findings and policy recommendations of MGT, and to offer an independent opinion regarding whether legal grounds exist to use race and gender conscious measures to address the disparities and discrimination documented in the 2011 Disparity Study.
- On February 13, 2012, City Council approved the Committee recommendation to retain Franklin Lee for such purpose.
- On May 9, 2012 Franklin Lee provided a written memorandum to the City (the “Lee Report”), which included the following findings and conclusions:
  - MGT’s stated methodologies for the 2011 Disparity Study were appropriate and in keeping with controlling legal precedent and industry standards to the extent available data permitted.

- The 2011 Disparity Study documented substantial disparity in the underutilization of MWBE firms in all categories of prime contracts entered into by the City. It further found substantial disparity in the underutilization of certain categories of MBE firms in subcontracting for construction and architectural, engineering and surveying. The SBO Program was not fully successful in remediating these disparities.
- The robust body of anecdotal data collected by MGT identified recognized forms of marketplace discrimination that is adversely affecting the ability of MWBE firms attempting to do business on City of Charlotte contracts. In some instances alleged discrimination was directly attributed to the City. In other instances it was attributed to prime contractors and the private sector.
- The quantity and quality of MGT's anecdotal data compares favorably with other disparity studies, and when combined with the private sector market analysis and regression analysis included in the study, establishes a strong basis for concluding that marketplace discrimination occurs in much more than a few isolated incidents.
- Race and gender neutral measures such as the SBO Program are not adequate to address the marketplace discrimination found in the 2011 Disparity Study, as evidenced in part by the fact that substantial disparities continue to exist despite eight years of aggressive enforcement of the SBO Program by the City.
- The 2011 Disparity Study establishes a strong basis in evidence that supports the use of narrowly tailored race and gender conscious remedies to more fully remedy the ongoing effects of marketplace discrimination on City contracts.
- On May 17, 2012 Franklin Lee presented and discussed his findings and conclusions with the Economic Development Committee.
- On June 25, 2012, on recommendation of the Economic Development Committee, the Charlotte City Council accepted and adopted the findings, conclusions and analyses set forth or referenced in Chapters 1 through 6 of the 2011 Disparity Study and in the Lee Report.
- Also on June 25, 2012, Council directed City staff to work with the Economic Development Committee to draft a SBE/MWBE Program that utilizes both race and gender neutral measures and race and gender conscious measures to remediate the discrimination and address the marketplace barriers documented in MGT's Disparity Study Update Report, consistent with the findings and conclusions set forth in the Lee Report.
- City staff developed the Charlotte Business Inclusion Program with input from City Council's Economic Development Committee, the Disparity Study Advisory Committee, and from stakeholders in the local business community.
- On December 4, 2012 and December 13, 2012, staff hosted two community forums to share information regarding the proposed program changes and seek feedback from stakeholders.
- On March 25, 2013 City Council held a public hearing on the proposed CBI Program
- Participants at the community forums and the public hearing reported additional instances of discrimination and marketplace barriers, and expressed support for the proposed CBI Program.
- City Council adopted the CBI Program on April 8, 2013, directing that it go into effect on July 1, 2013.
- In adopting the CBI Program, City Council:
  - Reaffirmed and accepted the findings and conclusions set forth or referenced in Chapters 1 through 6 of the 2011 Disparity Study, the appendices to the 2011 Disparity Study and the Lee Report;
  - Acknowledged that years of vigorously enforcing race and gender neutral remedies has failed to fully eliminate the substantial underutilization of minority and women firms in City contracts;
  - Found that the City of Charlotte has a compelling interest to remedy the ongoing effects of marketplace discrimination against minority and women owned businesses and to avoid becoming a passive participant in private sector discrimination;

- Proclaimed that the City of Charlotte is fully committed to not only remedying the ongoing effects of marketplace discrimination, but also to using its spending powers in a manner that promotes a robust and inclusive economy that fully utilizes all segments of its business population, regardless of race or gender; and
- Based upon an extensive factual predicate, determined that a narrowly tailored combination of race and gender neutral and race and gender conscious remedies is necessary to serve those compelling interests and needs of the City of Charlotte.
- City Council further found that continuation of a small business opportunity program establishing goals and good faith efforts requirements in City contracts will benefit the City because:
  - Helping small businesses participate in City contracts will facilitate small business growth and profitability in the Charlotte Combined Statistical Area (CSA).
  - Facilitating small business growth and profitability in the Charlotte CSA will promote economic growth and development within the City of Charlotte.
  - Encouraging small business growth in the Charlotte CSA will also promote competition on City contracts by increasing the number of bidders.
  - Small business standards set at roughly one quarter of the size standards established by the Small Business Administration (SBA) for businesses participating in SBA programs are reasonably reflective of business size in the Charlotte CSA.

**1.2. Program Objectives.** The CBI Program seeks to remediate the ongoing effects of marketplace discrimination that the City has found continue to adversely affect the participation of minority and women owned firms in City contracts. The CBI Program further seeks to enhance competition in City contracting and promote economic growth and development in the City of Charlotte by:

- Increasing Minority, Women, Small Business Enterprise utilization in City contracting;
- Promoting existing small business growth and profitability in the Charlotte CSA;
- Promoting small business start-up and development in the Charlotte CSA;
- Monitoring, evaluating and reporting on SBE and MWBE participation and contract compliance with the provisions of the CBI Program.

**1.3. Program Enabling Legislation.** On August 27, 2002, the North Carolina General Assembly ratified S.B. 1336 which added a new Section 8.88 to the Charlotte City Charter authorizing the City to establish a Small Business Enterprise Program to promote the development of small businesses in the Charlotte Metropolitan Statistical Area, and to enhance opportunities for small businesses to participate in City contracts (Session Law 2002-91). The legislation was amended in 2008 to allow the City to extend coverage outside of the Charlotte Metropolitan Statistical Area to include additional counties based on the City's periodic assessment of where small business development initiatives will promote economic development within the City of Charlotte. Section 8.88 of the Charter authorizes the City to establish bid and proposal specifications that include goals and good faith efforts requirements to enhance participation by small businesses in City contracts. It also permits the City to consider a bidder's compliance with such requirements in awarding contracts, and to refuse to award contracts to bidders that fail to comply. In addition, the City has broad authority to engage in economic development and community development activities pursuant to G.S. 158-7.1 and G.S. 160A-456.

The City is authorized and required to have a minority and women business participation program for certain City contracts by G.S. 143-128.2., 143-128.1, 143-128.3, 143-128.4 and 143-131.

**1.4. Anti-Discrimination.** The City is committed to promoting equal opportunities in City contracting. The City has adopted a Commercial Non-Discrimination Policy that prohibits discrimination on the basis of race, gender, religion, national origin, ethnicity, age, marital status, familial status, sexual orientation, gender identity, gender expression, disability, or any other form of unlawful discrimination in connection with City contracts, including discrimination in the solicitation, selection, hiring, or treatment of vendors, suppliers, subcontractors, brokers, joint venture partners or manufacturers. The City further prohibits retaliation against any person, business or other entity for reporting any incident of prohibited discrimination.

**1.5. Program Roles and Responsibilities.** In addition to the responsibilities specifically identified in this Policy, City personnel shall have the following roles and responsibilities in administering and enforcing the CBI Program:

- **The Charlotte City Manager** is primarily responsible for implementing the CBI Program. The City Manager shall:
  - Determine the organization structure and appropriate staffing of the CBI Program Office;
  - Establish lines of authority and reporting for successful program implementation;
  - Recommend funding for CBI Program staffing, operations, training and outreach;
  - Assure the integration of the CBI Program components into the practices and processes of all City Departments (Department ); and
  - Make revisions to the CBI Program as needed from time to time to facilitate administration and fulfill Program objectives.
  - Evaluate all Department Directors efforts in integrating the CBI Program Policy into their practices and processes.
- **The CBI Program Manager** is responsible for:
  - Daily administration of all components of the CBI Program and supervision of the CBI Program staff;
  - Developing such rules and guidelines as may be necessary to effectuate the purposes of the CBI Program;
  - Advising the City Manager on CBI Program issues;
  - Consulting with Department Directors and their staffs on CBI Program implementation;
  - Being the ombudsman for SBE, MBE and WBE business concerns associated with the CBI Program;
  - Making revisions to the CBI Program as needed from time to time to facilitate administration and fulfill Program objectives.
- **Department Directors** are responsible for:
  - Ensuring CBI Program compliance within their respective Departments;
  - Developing and implementing strategies to achieve the annual and project participation goals established by the CBI Program;
  - Integrating the CBI Program components into their practices and processes;
  - Monitoring and reporting minority and women business participation as required by North Carolina law, including N. C. Gen. Stat. §143-128.3 (Minority Business Enterprise Participation Administration);
  - Reporting SBE, MBE and/or WBE utilization as required by the CBI Program Manager; and
  - Promoting the CBI Program and SBE, MBE and WBE participation in the contracting and procurement activities of their Department.
- **The City Attorney's Office** is responsible for:
  - Reviewing the CBI Program, rules and guidelines to ensure their compliance with federal, state and local laws;
  - Reviewing recommendations to reject a Bid for non-compliance with CBI Program requirements and provisions; and
  - Advising the City Council, City Manager, Department Directors, and the CBI Program Manager on legal issues related to the CBI Program and its implementation.

## Section 2: Prime Contracting

- 2.1 Annual Citywide Aspirational SBE and MWBE Goals for Prime Contracts:** At the beginning of each fiscal year, the Program Manager will recommend to the City Manager annual, Citywide goals for SBEs and MWBEs for certain, designated categories of Prime Contracts. The initial categories shall be Construction, Architecture, Engineering and Surveying, Professional Services, Other Services and Goods & Commodities. The annual SBE and MWBE goals may be combined or separate, and are collectively referred to as the “MWSBE Goals.” The City Manager will further break the Citywide MWSBE Goals down by Department. The Program Manager may modify the categories for reporting purposes from time to time based on business trends and available data. In determining Prime Contracting goals and measuring goal achievement, the Program Manager shall exclude Exempt Contracts, other than exemptions based on piggybacking, buying off the North Carolina state contract or buying from a competitive bidding group. If a Department consistently fails to meet its MWSBE Goals, then the Program Manager may require the Department to confer with the CBI Program Office regarding MWSBE opportunities on Prime Contracts over a certain dollar threshold to be established by the Program Manager. The annual MWSBE Goals for Construction and Goods Prime Contracts shall apply to Informal Contracts only (because Formal Contracts in these categories are subject to formal bid requirements under the North Carolina bid statute, thus limiting the City’s ability to impact MWSBE utilization).

Notwithstanding the forgoing, the MBE and WBE component of the MWSBE Goals shall be set only for those categories of firms that have experienced documented discrimination in the Charlotte CSA for the particular category of Prime Contract. For instance, the 2011 Disparity Study reported disparity on Prime Contracts for Architecture, Engineering and Surveying Contracts for African American, Hispanic, Native American and Non-Minority Women firms. Thus, the MWBE Goal for Architecture, Engineering and Surveying Contracts will be based on the availability of African American, Hispanic, Native American and Non-Minority Women firms in the relevant market, and only MWBEs in those designated categories would count toward the MWBE Goal.

- 2.2 Goal Setting Methodology for Prime Contracts.** In setting SBE and MWBE aspirational goals for Prime Contracts, the Program Manager shall take into account the availability of SBEs and MWBEs in the relevant market that are registered to do business with the City. In addition, the Program Manager shall conduct such inquiries, studies and hearings, and utilize information and assistance from such persons, Contractors, entities or organizations including but not limited to the Department Directors, as he or she deems necessary to establish recommended goals.
- 2.3 Targeted Outreach and Designated Contracts for SBEs.** The City is committed to taking reasonable steps to eliminate obstacles that may preclude SBEs from participating as Prime Contractors on City Contracts. Where feasible, the Program Manager may from time to time designate certain Contracts or categories of Contracts in which solicitation efforts will be directed only to SBEs. For Construction and Commodities Contracts, such designations will be limited to Informal Contracts. For Service Contracts other than Architecture, Engineering and Surveying Contracts, the Program Manager may designate certain Contracts or categories of Contracts where participation is limited to SBEs. In designating Contracts for targeted outreach or SBE participation, the Program Manager will take into account the size and scope of the Contract and the availability of SBEs to provide the applicable service or products. The Program Manager will further confer with the City Department issuing the Contract, and in the event such Department disagrees with the designation the City Manager or an Assistant City Manager shall resolve the matter.
- 2.4 Data Tracking for MSWBEs.** The Program Manager will issue reports on a bi-annual basis regarding the utilization of MWBEs and SBEs in various categories of Prime Contracts. MWSBE Goals will be adjusted annually based on documented disparity and achieved utilization.

- 2.5 Accountability.** The City Manager shall ensure that Department Directors contribute appropriately to the achievement of Citywide SBE and MWBE goals. The City Manager will further ensure that Department Directors work with the Program Manager in developing appropriate measures to remediate ongoing marketplace discrimination against MBEs or WBEs that has impacted their ability to participate in City Contracts.

### **Section 3: Subcontracting Goals**

- 3.1 For all Construction Contracts of \$300,000 or more, and for all Architecture, Engineering and Surveying Contracts of \$100,000 or more, the City shall establish one or more Subcontracting Goals unless the Program Manager grants an exemption.** Subcontracting Goals on such Contracts may consist of:

- Both an SBE Goal and an MWBE Goal;
- A combined MWSBE Goal;
- Only an MWBE Goal; or
- Only an SBE Goal

Subcontracting Goals shall be set in accordance with Section 3.4. MWBE Goals shall be set only for those categories of firms that have experienced discrimination in the Charlotte CSA and have been adversely impacted in their ability to obtain Construction Contracts or Architecture, Engineering and Surveying Contracts with the City (as applicable), as documented by the City.

- 3.2 The City may establish an SBE Goal on Commodities Contracts of \$100,000 or more on a case by case basis,** when there are subcontracting opportunities and available SBEs.

- 3.3 The City shall establish SBE Goals for Service Contracts of \$100,000 or more,** provided that, if the Program Manager or City Manager determines it to be in the best interests of the City, the Program Manager may waive the goal requirement for a given Service Contract, or may negotiate a Committed SBE Goal with the successful Proposer as part of the Contract negotiation process. In the event a City Department Director issuing a Service Contract disagrees with the goal set by the Program Manager, the City Manager or an Assistant City Manager shall resolve the matter. MBE and WBE Goals shall be set or negotiated only for those categories of firms that have experienced discrimination in the Charlotte CSA and have been adversely impacted in their ability to obtain Service Contracts with the City, as documented by the City.

- 3.4 Goal-Setting Methodology for Subcontracting.** The Program Manager shall establish a methodology for setting MWBE, SBE and MWSBE Goals on City Contracts, through rules and guidelines for the implementation of the CBI Program. Such methodology shall take into account contract size, reasonably known availability of subcontracting opportunities that SBEs and MWBEs can perform on each Contract, whether MWBE Goals for the project are legally warranted to remedy the effects of past discrimination and other factors as the Program Manager deems appropriate. Such methodology may also take into account the use of an optional Goals Committee or consultation of the City's Business Advisory Committee. MWBE Goals shall be set only for those categories of firms that have experienced discrimination in the Charlotte CSA and have been adversely impacted in their ability to obtain Construction Contracts with the City, as documented by the City.

- 3.5 State and Federally Funded Contracts.** Notwithstanding anything contained herein to the contrary, the City will not set Subcontracting Goals on any state or federally funded Contract that is subject to state or federal requirements for minority and women business utilization, including without limitation Contracts subject to the U.S. Department of Transportation's Disadvantaged Business Enterprise Program.

### **3.6 Goals Committees.**

- 3.6.1 Appointment.** The City Manager may appoint, as requested in the Program Manager's discretion, one or more Goals Committees to advise and assist the Program Manager in determining SBE, MBE and WBE Goals for various types of Contracts. Goals Committees, if appointed, shall consist of members with first-hand knowledge of the applicable service or industry.
- 3.6.2 Role of Goals Committees.** If appointed, Goals Committees shall consider data about SBE and MWBE availability to perform the substantive work requirements of a Contract under consideration, and shall provide advice to the Program Manager concerning SBE, MBE and WBE goal settings on those projects for which the Program Manager has requested their assistance. The Program Manager may use such advice and assistance from the Goals Committees to the extent that the Program Manager deems it appropriate and consistent with the purposes of the CBI Program.
- 3.6.3 Business Advisory Committee.** The Program Manager may also consult the Business Advisory Committee regarding SBE, MBE, and WBE Goals for various Contracts.

### **Section 4: Mandatory Subcontracting Requirements**

- 4.1 Authorization and Intent.** Section 8.82 of the Charlotte City Charter authorizes the Charlotte City Council to establish specifications requiring Contractors to subcontract a certain percentage of the work in Construction Contracts. City Council may from time to time elect to exercise this authority to enhance SBE and/or MWBE participation in Construction Contracts when Council determines that doing so is reasonably practicable in light of industry practice and consistent with the City's best interests.
- 4.2 Guidelines and Recommendations.** The Program Manager will develop guidelines for identifying those Contracts where establishing mandatory subcontracting requirements would: (a) be practicable in light of industry practice and (b) provide significant opportunities for SBEs and MWBEs. Based on these guidelines, the Program Manager may from time to time recommend that City Council establish mandatory subcontracting requirements for particular Contracts. If City Council establishes mandatory subcontracting requirements for a Contract, all Bidders submitting Bids or Proposals on the Contract shall be required to: (a) subcontract the amount of work specified by City Council; and (b) use Good Faith Efforts (as defined in Parts B, C or D, depending on the type of Contract) to subcontract such work to SBEs and/or MWBEs. In the event a Contractor is unable to subcontract the designated percentage of work to SBEs or MWBEs, the Contractor shall nevertheless be required to subcontract the designated percentage of work to other third party contractors.

**Section 5: Special Provisions for Informal Contracts and Exempt Contracts.** Informal Contracts include Construction Contracts estimated to be less than \$500,000 and Services and Commodities Contracts estimated to be less than \$100,000. Exempt Contracts are Formal Contracts for which no MWSBE Subcontracting Goals are set due to the exemptions listed in Appendix 1.

- 5.1. Certain Exempt Contracts and Informal Contracts Are Subject to Part D of the CBI Program.** Despite the absence of MWSBE Goals, Service Contracts and Construction Contracts that are Informal Contracts or that qualify as Exempt Contracts based on having been procured without a competitive process or based on a waiver from the Program Manager are subject to Part D of the CBI Program (relating to Post Contract Award).
- 5.2. Special Provision for Exempt Contracts.** Business Enterprises that enter into Exempt Contracts must notify the City of any subcontracting opportunities that may arise on the Exempt Contract for which there are SBEs or MWBEs listed in the City's database. Failure to comply with this Section shall be deemed a material breach of the Exempt Contract. In such event, the City shall be entitled to exercise any of the remedies set forth in Part D.



- 5.3. Extension of CBI Program Requirements to Exempt Contracts.** Department Directors may in their discretion elect to include in bids and proposals for Informal Contracts and Exempt Contracts a requirement that bidders comply with any or all CBI Program requirements, including but not limited to the requirement that an MWSBE Goal be established for the Contract. In such event the Exempt Contract shall be deemed a “Contract” for purposes of this Program.

## **Section 6: Other Outreach, Assistance and Business Development**

The CBI Office, in cooperation with Department Directors or their designees, shall develop programs and activities to provide outreach and business development assistance to SBEs and MWBEs. These activities may include, but are not limited to:

- 6.1.** Communicating information on the CBI Program through newsletters, the Internet, training activities, and other outreach activities conducted by the City or by other public or private entities in collaboration with the City.
- 6.2.** Conducting workshops for training and development.
- 6.3.** Providing networking opportunities.
- 6.4.** Developing a resource directory to be provided to the small business community in the Charlotte CSA with information as to assistance in bonding, financial management and/or accounting, continuing education, professional organization and other resources that improve small business market access or capacity.
- 6.5.** Such other programs or activities as the Program Manager may from time to time recommend.

## **Section 7: CBI Program Administration**

- 7.1. Data Tracking and Reporting.** The Program Manager shall establish processes and procedures to track and report data measuring the outcomes of the CBI Program. On at least a biannual basis, the Program Manager will issue reports that show and compare the availability and utilization of SBEs, MBEs and WBEs on City Contracts, and that identify key achievements and challenges encountered during the reporting period.
- 7.2. Rules and guidelines.** The Program Manager shall have the power and authority to adopt rules and guidelines to effectuate the purpose and operation of the CBI Program, including by way of example but not by way of limitation, rules and guidelines relating to:
  - 7.2.1. Reserved.
  - 7.2.2. Composition of the Goals Committees and/or the procedure for inquiries, studies or hearings with respect to establishing Annual Citywide Aspirational MWSBE Goals or project specific MWSBE Goals;
  - 7.2.3. Determination of Good Faith Negotiation and Good Faith Efforts criteria and the required documentation;
  - 7.2.4. Determination of whether MWSBE Goals have been met and the required documentation;
  - 7.2.5. Determination of what constitutes Commercially Useful Function and/or Conduit activity;
  - 7.2.6. Clarification of defined terms or correction of inappropriate cross-references to sections within the CBI Policy;
  - 7.2.7. The procedures, methods and criteria for certification and decertification of SBEs, including but not limited to the procedures and methods of Certification, questions of ownership, management and control, affiliation, independence, continued eligibility and renewal of Certification, interviews, complaints, investigations and onsite visits, burden of proof, denial or granting of Certification, suspension and/or revocation of Certification, graduation size standards and other criteria;
  - 7.2.8. The procedures and criteria for verifying that MBEs and WBEs certified by the N.C. Office of Historically Underutilized Businesses are participants in the City's relevant market.

- 7.3. Authority to Amend or Modify Program, Forms and Documentation Requirements.** The City Manager is authorized to amend this Program as he or she deems appropriate from time to time, consistent with the overall purpose and intent of the Program. The Program Manager shall have the power and authority to amend this Program to modify any forms or documentation requirements that are required by this Program, including but not limited to the forms required to document the attainment of MWSBE Goals, Good Faith Negotiation or Good Faith Efforts. Such modifications may increase, decrease or change the forms and/or documentation requirements established by this Program in such manner as the Program Manager deems appropriate in his or her discretion to promote the purpose and intent of the Program, including but not limited to:
- 7.3.1. Promoting outreach to SBEs and MWBEs;
  - 7.3.2. Promoting the utilization and development of SBEs and MWBEs; and
  - 7.3.3. Accomplishing (a) and (b) in a manner that minimizes the burden on Bidders, MWBEs and SBEs and minimizes the cost of administering the Program to City taxpayers.

The Program Manager is further authorized to modify Program requirements on a case by case basis when appropriate for specific Contracts, such as by reducing the time requirements for certain Good Faith Efforts when a Bid process is expedited.

- 7.4. Minor Non-Compliance Waiver.** In addition to, and without limiting the Program Manager's power and authority to grant waivers as provided elsewhere in this Program, the Program Manager shall have the power and authority to waive non-compliance with this Program if:
- a. The non-compliance is minor in nature
  - b. Waiving the non-compliance would not put Bidders that complied with the CBI Program at a competitive disadvantage; and
  - c. The non-compliance does not reflect a lack of diligence on the Bidder's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more bids might be deemed a lack of diligence in complying with the Program.

The conditions set forth in subsections (a) through (c) of this Section shall not apply to waivers granted under other waiver provisions in Parts B and C of this Program.

The waivers authorized in this Program may be granted without notice to City Council (including without limitation waivers authorized in Parts B and C). Nothing in this Program shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

- 7.5. Reviews.** Any person or entity who is the subject of and is directly and adversely affected by a determination of the Program Manager in connection with CBI Program may appeal such decision by expressing his or her concerns in writing to the CBI Program Manager within **30 Days** after receiving notice of the decision. If the Program Manager fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal by sending written notice to the City Manager. Notices of appeal must be sent within **10 Days** after the aggrieved party receives notice of the decision being appealed from, and must identify the decision being appealed and each reason why the aggrieved party takes issue with the decision. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

**Notwithstanding the forgoing, a person or entity seeking review of a decision relating to an upcoming Bid process must notify the CBI Program Manager in writing of the request for review within three (3) Business Days after the person or entity first learned of the decision for which review is sought.** For instance, if a Bidder learns at 10:00 am on Wednesday, April 2 that the City is rejecting its Bid due to non-compliance with this Program, and the Bid Award is set for the following Wednesday, April 9, the Bidder must request a review in writing from the Program Manager by 10:00 am Friday, April 4.

- 7.6. Delegation.** The CBI Program Manager, the City Manager and each Department Director may designate other individuals to perform any tasks or functions assigned to them in this Program, including without limitation hearing appeals and making decisions regarding rejection of Bids or granting of waivers.

**Section 8: Sunset for Race and Gender Conscious Measures.** Absent an extension by City Council, the race and gender conscious measures of the CBI Program, including the establishment of MWBE Goals, will expire on June 30, 2017.

**Section 9: Severability**

If any provision of the CBI Program or any application thereof is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of the CBI Program which can be given effect without the invalid provisions or applications and the remaining provisions are to be severable and shall remain in full force and effect.

## **Appendix 1 to Part A CBI Program**

### **Definitions**

Capitalized terms used in the CBI Program shall have the meanings set forth below

1. **Affiliate:** The term "Affiliate" is defined in Part E, Section 2.11. The definition applies to both SBEs and MWBEs.
2. **Bid:** Documents a Business Enterprise submits in response to City Solicitation Documents for the purpose of obtaining a Contract (including without limitation responses to requests for qualification, requests for proposals and invitations to bid).
3. **Bidder:** A Business Enterprise that submits a Bid or Proposal for a Contract.
4. **Bid Opening:** For Contracts that are subject to formal bidding requirements under the North Carolina Bid statutes (G.S. 143-128 and 143-129 et. seq.), the Bid Opening shall be the date that Bids are opened by the City. For other Contracts, the Bid Opening shall mean the date that Bids, Proposals or submittals are due.
5. **Broker:** A Business Enterprise that performs a Commercially Useful Function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, but is not a Hauler, Manufacturer or Regular Dealer. A manufacturer's representative shall be deemed a Broker. Only bona fide commissions earned by a Broker for its activities in performing a Commercially Useful Function on City projects shall be counted toward the SBE or MWBE Goal, provided such commissions are reasonable and not excessive as compared with fees customarily allowed for similar services.
6. **Business Advisory Committee:** A committee of citizens appointed by the Mayor and City Council for the purpose of providing recommendations and advice to the City on ways the City helps businesses in Charlotte.
7. **Business Days:** Days on which the administrative offices of the City of Charlotte are open for the public to do business.
8. **Business Enterprise:** Any corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity, whether operated for profit or a non-profit, other than: (a). a Financial Partner; or (b) the City or any other unit of federal, state or local government.
9. **CBI Program:** The Charlotte Business Inclusion Program.
10. **CBI Office:** The City office charged with administering and enforcing the CBI Program.
11. **Charlotte CSA:** The Charlotte-Gastonia-Salisbury Combined Statistical Area in effect as of April 8, 2013, consisting of: (a) the North Carolina counties of Mecklenburg, Anson, Cabarrus, Gaston, Union, Stanly, Lincoln, Rowan, Iredell and Cleveland; and (b) the South Carolina counties of York, Chester and Lancaster.
12. **City:** The City of Charlotte, North Carolina, a North Carolina municipal corporation.
13. **City Solicitation Documents:** The documents issued by the City to solicit Bids or Proposals for a Contract, including but not limited to invitations to bid, requests for qualifications, requests for proposals, requests for quotes, plans and specifications and proposed contract provisions.

14. **Commercially Useful Function:** A function performed by a Business Enterprise when it is responsible for supplying goods or executing of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. The Program Manager will determine whether an MWSBE is performing a Commercially Useful Function, in his or her discretion, based on the amount of work subcontracted, industry practices and other relevant factors. Commercially Useful Function is measured for purposes of determining participation on a Contract, not for determination of Certification eligibility.
15. **Committed Subcontracting Goal:** An MBE, SBE, WBE, MWBE and/or MWSBE Goal that a Contractor commits to achieve for a Contract at Contract award (which will be the MBE, SBE, WBE, MWBE and/or MWSBE goal stated in the Contractor's Bid or Proposal unless modified by mutual agreement of the City and the Contractor).
16. **Commodities Contract:** A Contract under which a Business Enterprise agrees to provide goods, supplies, apparatus or equipment to the City.
17. **Conduit:** An SBE or MWBE that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on the contract, to a non-SBE or non-MWBE firm. In this type of relationship, the SBE or MWBE has not performed a Commercially Useful Function and therefore the SBE's or MWBE's participation does not count toward the SBE Goal.
18. **Construction Contract:** A Contract under which a Business Enterprise agrees to provide construction or repair services to the City. A Construction Contract may be for horizontal or vertical construction or repair work.
19. **Construction Manager-At-Risk Contract (or CM at Risk Agreement):** A construction manager-at-risk agreement as defined in N.C. Gen. Stat. 143-128.1. This includes contracts where a licensed general contractor provides construction management services throughout the construction process, and guarantees the cost of the project.
20. **Contract:** Any agreement through which the City procures goods or services from a Business Enterprise, other than Exempt Contracts. Contracts include agreements and purchase orders for (a) construction, re-construction, alteration and remodeling; (b) architectural work, engineering, surveying, testing, construction management and other professional services related to construction; (c) services of any nature (including but not limited to general consulting and technology-related services), and (d) apparatus, supplies, goods or equipment.

The term "Contract" shall also include Exempt Contracts for which an SBE, MBE or WBE Goal has been set.

Financial Partner Agreements, Development Agreements, Design-Build Agreements and Construction Manager-at-Risk Agreements shall also be deemed "Contracts," but shall be subject only to the Sections of the CBI Program listed below (and any other provisions referenced therein):

Financial Partner Agreements:	Part F
Construction Manager at Risk Agreements	Part G
Developer Agreements:	Part G
Infrastructure Improvement Agreements	Part G
Design-Build Agreements	Part G

21. **Contractor:** A Business Enterprise that enters into a Contract, including but not limited to construction contractors, consultants, architects, engineers, surveyors, suppliers and other providers of goods and services. For purposes of Part D only, the term "Contractor" shall also include Business Enterprises that enter into Service Contracts and Construction Contracts that qualify as Exempt Contracts based on having been procured without a competitive process or that are exempt through a waiver from the Program Manager.
22. **Days:** Any reference to "days" in this Program shall mean calendar days, unless it is specifically indicated to be Business Days.

23. **Department Director:** Manager or director of a City Department. As used in this Program, the term Department Director also applies to a person that the Department Director may designate to take such actions as are required or permitted under this Program.
24. **Developer Agreement:** A Contract under which the City agrees to provide funding of \$200,000 or more for a “public-private development project,” as defined in Section 7-109 of the City of Charlotte Charter. Section 7-109 defines a public-private development project as a capital project comprising both public and private facilities that are located (i) in the City’s central business district, as defined by City Council; (ii) in or along a major transportation corridor; or (iii) in a development zone designated pursuant to G.S. 105-129.3A.
25. **Design-Build Agreement:** A Contract under which the City contracts with a single Business Enterprise for the design, management and construction of a horizontal or vertical construction project.
26. **Eligible Owner:** An owner of a Business Enterprise who meets the City’s SBE certification criteria for “Eligible Owner” as set forth in Part E of the CBI Program.
27. **Exempt Contracts:** Unless a City Department elects otherwise, Contracts that fall within one or more of the following categories are “Exempt Contracts” and shall be exempt from all aspects of the CBI Program except for requirements identified in Section 5 of Part A:
- **No Competitive Process Contracts:** Contracts or purchase orders that are entered into without a competitive process, or entered into based on a competitive process administered by an entity other than the City, including but not limited to contracts that are entered into by sole sourcing, piggybacking, buying off the North Carolina State contract, buying from a competitive bidding group purchasing program as allowed under G.S. 143-129(e)(3), or using the emergency procurement procedures established by the North Carolina General Statutes.
  - **Managed Competition Contracts:** Managed competition contracts pursuant to which a City Department or division competes with Business Enterprises to perform a City function.
  - **Real Estate Leasing and Acquisition Contracts:** Contracts for the acquisition or lease of real estate.
  - **Federal Contracts Subject to DBE Requirements:** Contracts that are subject to the U.S. Department of Transportation Disadvantaged Business Enterprise Program as set forth in 49 CFR Part 26 or any successor legislation.
  - **State Funded Contracts Subject to the State’s Required MWBE Goal.** Contracts that are subject to an MWBE Goal set by the State of North Carolina pursuant to N.C. Gen. Stat. 143-128.2.
  - **Financial Partner Agreements with DBE or MWBE Requirements:** Contracts that are subject to a disadvantaged business enterprise program or minority and women business development program maintained by a Financial Partner.
  - **Interlocal Agreements:** Contracts with other units of federal, state or local government.
  - **Contracts for Legal Services:** Contracts for legal services, unless otherwise indicated by the City Attorney.
  - **Contracts with Waivers:** Contracts for which the CBI Program Manager or the City Manager waives the CBI Program requirements (such as when there are no SBE or MWBE subcontracting opportunities on a Contract).
  - **Special Exemptions:** Contracts where the Department and the Program Manager agree that the Department or the Contractor had no discretion to hire an SBE or MWBE (e.g., emergency contracts or contracts for banking or insurance services) shall be Exempt Contracts.
28. **Financial Partner:** A non-profit agency or organization with whom the City of Charlotte contracts to provide specific services for the community. These agencies extend the City’s capacity to address strategic priorities and concerns of the community. Partnerships include those due to special legislation, those that support City Council’s strategic focus areas, and those that contribute to important community activities.

29. **Financial Partner Agreements:** A Contract under which the City agrees to provide funding to a Financial Partner.
30. **Formal Contracts:** Contracts that are estimated to equal or exceed the following dollar thresholds prior to issuing the City Solicitation Documents:
- Construction Contracts: \$500,000
  - Service Contracts and Commodities Contracts: \$100,000.
31. **Goals Committees:** Committees of citizens and/or City staff with expertise in construction and other relevant industries, which may be appointed by the City Manager and/or Program Manager as set out in Part A of this Program to advise the Program Manager as to SBE, MBE, WBE Goal setting.
32. **Good Faith Efforts (or GFEs):** The requirements that Bidders and Proposers must meet to show that they actively and aggressively sought to achieve the applicable SBE, MBE or WBE Goal. Good Faith Efforts requirements vary based on the type of Contract, and are defined by Contract type in Parts B, C, F and G of this Program
33. **Good Faith Negotiation:** The requirements that Bidders and Proposers must meet to show that they negotiated in good faith with MWSBES. Good Faith Negotiation requirements vary based on the type of Contract, and are defined by Contract type in Parts B, C, F and G of this Program
34. **Hauler:** A Business Enterprise that delivers materials or supplies to a jobsite or hauls away materials, supplies or waste from a jobsite, but is not a Broker, Manufacturer or Regular Dealer. A Hauler may or may not take title to such materials and supplies it delivers. Only bona fide fees earned by a Hauler for performing a Commercially Useful Function (not the cost of the materials, supplies or waste it hauls) shall be counted toward the SBE or MWBE Goal, provided such fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
35. **Informal Contracts:** Contracts that are estimated to be less than the following dollar thresholds prior to issuance of the City Solicitation Documents:
- Construction Contracts: \$500,000
  - Service Contracts and Commodities Contracts: \$100,000.
36. **Infrastructure Reimbursement Agreements:** Reimbursement agreements with private developers and property owners that are approved by the City pursuant to Section 2-2 of Charlotte City Code for the design and construction of municipal infrastructure that is included in the City's Capital Improvement Plan and serves the developer or property owner. Infrastructure Reimbursement Agreements may involve, without limitation, water mains, sanitary sewer lines, lift stations, stormwater lines, streets, curb and gutter, sidewalks, traffic control devices and other associated facilities.
37. **Joint Venture:** An association of two (2) or more Business Enterprises to constitute a single Business Enterprise for which purpose they combine their property, capital, efforts, skills and knowledge. Each participant in the Joint Venture must be responsible for a clearly defined portion of work, must perform a Commercially Useful Function, and must share in the ownership, control, management responsibilities, risks and profits of the Joint Venture.
38. **Manufacturer:** A Business Enterprise that operates or maintains a factory or establishment that produces, or substantially alters, on the premises the materials, supplies or equipment provided to a Contractor in connection with a Contract. Expenditures for materials, supplies and equipment obtained from a Manufacturer shall count 100% toward the SBE and MWBE Goal.
39. **MBE:** A Business Enterprise that: (a) is certified by the State of North Carolina as a historically underutilized business within the meaning of N.C. Gen. Stat. 143-128.4, (b) is at least fifty-one percent (51%) owned by one or more persons who are members of one of the groups set forth below; and (c) meets the criteria established by the Program Manager from time to time for determining whether the Business has a Significant Business Presence in the City's relevant market (the Charlotte CSA):

<b>MBE Category</b>	<b>Owned or Controlled by a Person or Persons</b>
<b>African American or Black</b>	Having origins in any of the black racial groups of Africa
<b>Hispanic</b>	Of Spanish or Portuguese culture having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race
<b>Asian</b>	Having origins in any of the original peoples of the Far East, Southeast Asia, Asia, Indian continent, or Pacific islands
<b>Native American or American Indian</b>	Having origins in any of the original Indian peoples of North America

40. **MBE Goal:** A goal established by the City for MBE utilization on a Contract. Calculated as a percentage, the MBE Goal represents the total dollars spent with MBEs as a portion of the total Bid or Proposal amount, including any contingency.
41. **MSBE:** The term “MSBE” is used to refer collectively to MBEs and SBEs. In some contexts it means all MBEs and SBEs, and in other contexts it means one or more categories of MBEs or SBEs.
42. **MSBE Goal:** The term “MSBE Goal” depends on the context. If Contract has separate Subcontracting Goals MBEs and SBEs, the term MSBE Goal is a shorthand way to refer collectively to both the MBE and SBE Goals. In some instances, the City may set one combined goal for MBEs and SBEs on a Contract, in which event the term MSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MSBE Goal represents the total dollars spent with MSBEs as a portion of the total Bid or Proposal amount, including any contingency.
43. **MWBE:** The term “MWBE” is used to refer collectively to MBEs and WBEs. In some contexts it means all MBEs and WBEs, and in other contexts it means one or more categories of MBEs or WBEs.
44. **MWBE Goal:** The term “MWBE Goal” depends on the context. If Contract has separate Subcontracting Goals MBEs and WBEs, the term MWBE Goal is a shorthand way to refer collectively to both the MBE and WBE Goals. In some instances, the City may set one combined goal for MBEs and WBEs on a Contract, in which event the term MWBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MWBE Goal represents the total dollars spent with MWBEs as a portion of the total Bid or Proposal amount, including any contingency.
45. **MWSBE:** The term “MWSBE” is used to refer collectively to SBEs, MBEs and WBEs. In some contexts it means all SBEs, MBEs and WBEs, and in other contexts it means one or more categories of SBEs, MBEs or WBEs.
46. **MWSBE Goal:** The term “MWSBE Goal” depends on the context. If Contract has separate Subcontracting Goals MBEs, WBEs and/or SBEs, the term MWSBE Goal is a shorthand way to refer collectively to all MBE, WBE and SBE Goals set for the Contract. In some instances, the City may set one combined goal for MBEs, WBEs and/or SBEs on a Contract, in which event the term MWSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MWBE Goal represents the total dollars spent with MWBEs as a portion of the total Bid or Proposal amount, including any contingency.
47. **Modified GFEs or Modified Good Faith Efforts:** The requirements a Contractor must meet to solicit SBEs, MBEs and/or WBEs during the term of a Contract or Contract renewal, as set forth in Part D.
48. **NAICS:** North American Industry Classification System (NAICS) codes expressed either in number of employees (size standards) or annual receipts in millions of dollars by industry or service type.



49. **NIGP:** National Institute of Governmental Purchasing (NIGP) codes used to describe commodities purchased by governmental agencies. Services a Business Enterprise provides are categorized by NIGP codes.
50. **Packager:** A Business Enterprise that performs a Commercially Useful Function in the packaging of goods used in or delivered under a Contract, but is not a Regular Dealer or a Manufacturer. A Packager shall be considered as, and treated as, a Broker. This industry comprises establishments primarily engaged in packaging client-owned materials. The services may include labeling and/or imprinting the package. Only the fee paid to the Packager for services that constitute a Commercially Useful Function provided shall count toward the SBE or MWBE Goal, provided such fee is reasonable and not excessive as compared with fees customarily allowed for similar services
51. **Participation Plan (“Participation Plan”):** A modified version of the CBI Program that the City may require for Service Contracts under Part C, or that private developers, property owners, Design-Build Contractors and construction managers at risk develop as a condition of entering into Contracts subject to Part G of the CBI Program. The Participation Plan establishes the Subcontracting Goals, as applicable, and outlines the initiatives such party will undertake to achieve the Subcontracting Goals.
52. **Prime Contract:** A Contract between the City and a Business Enterprise.
53. **Program Manager:** The division manager of the City’s CBI Program or a person whom the division manager has designated to exercise the Program Manager’s rights or duties in a particular situation.
54. **Proposal:** Documents a Business Enterprise submits in response to City Solicitation Documents for the purpose of obtaining a Services Contract (including without limitation responses to requests for qualification, requests for proposals and invitations to bid).
55. **Proposal Opening:** The date and time that Proposals are due.
56. **Proposer:** A Business Enterprise that submits a Proposal for a Services Contract. In some instances, a Proposer may also be referred to as Bidder.
57. **Qualified MWBE or Qualified SBE:** A SBE or MWBE that has the financial ability, skill, experience and access to the necessary staff, facilities and equipment to complete a particular Contract or subcontract, and otherwise meets the criteria for being a “responsible bidder” within the meaning of the North Carolina bid statutes. The Program Manager, with advice from the City Attorney, may develop methods and criteria for assessment of whether a particular SBE or MWBE is Qualified for a particular Contract or subcontract for the purposes of the CBI Program. Nothing contained herein shall in any respect supersede or invalidate rules and regulations that a Department Director or City Division Director may promulgate with respect to pre-qualification of City Contractors. The City makes no representations as to the qualification of any SBE, MWBE or any other Business Enterprise.
58. **Quick Pay Commitment:** An agreement or policy commitment that a Prime makes to pay all SBEs and MWBEs participating in a Contract within twenty (20) Days after the Contractor confirms that the SBE or MWBE has properly performed the subcontracted work and the SBE’s or MWBE’s work has been properly completed.
59. **Regular Dealer:** This shall mean a Business Enterprise that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of a Contract are bought, kept in stock and regularly sold to the public in the usual course of business. To be a Regular Dealer, the Business Enterprise must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A Regular Dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Manufacturers, Brokers, Conduits, Packagers, Haulers and manufacturer’s representatives shall not be regarded as Regular Dealers within the meaning of this term. Expenditures for materials, supplies and equipment obtained from a Regular Dealer shall count 60% toward the SBE and MWBE Goal.

60. **Selection Committee:** An individual or committee of City staff and/or consultants formed to evaluate Proposals for a Services Contract.
61. **Services Contract:** A Contract for a Business Enterprise to provide services to the City that is not a Construction Contract. Examples include but are not limited to contracts for architectural, engineering, surveying or construction management services, contracts for janitorial services, contracts for computer consulting and contracts for language interpretation. Contracts for legal services are not Services Contracts within the meaning of this Section unless the City Attorney decides otherwise in a particular instance.
62. **Significant Business Presence:** A Business Enterprise is deemed to have a Significant Business Presence in the Charlotte CSA if it is headquartered in the Charlotte CSA. A location utilized solely as a post office box, mail drop or message center, or any combination thereof, will not be considered a Significant Business Presence.
63. **Small Business Enterprise (SBE):** A Business Enterprise that is certified by the Program Manager under Part E of the CBI Program as meeting all of the requirements for SBE certification.
64. **Small Business Enterprise Assistance Organizations (“SBE Assistance Organizations”):** An organization, other than the City, that accelerates the successful development of start-up and fledgling companies by providing them with an array of targeted resources and services. These organizations may provide management guidance, technical assistance and consulting tailored to small, minority- or women-owned businesses. The CBI Program Manager shall have sole discretion to determine whether a particular organization constitutes an SBE Assistance Organization for purposes of this Program.
65. **Small Business Enterprise Goal (“SBE Goal”):** A goal established by the City for SBE utilization on a Contract. Calculated as a percentage, the SBE Goal represents the total dollars spent with SBEs as a portion of the total Bid or Proposal amount, including any contingency.
66. **Subcontractor:** A Business Enterprise that directly contracts with a Contractor, subcontractor or subconsultant to provide goods or services or perform work in connection with a Contract. The value of the Commercially Useful Function to be performed by an SBE or MWBE Subcontractor shall count 100% toward the SBE and MWBE Goals, except to the extent the Subcontractor is a Hauler, Broker, Packager or Regular Dealer (in which event the those definitions shall determine the amount chargeable toward the SBE and MWBE Goals). The term “Subcontractor” also includes Subconsultants” and “Suppliers”.
67. **Subcontracting Goals:** The SBE, MBE, WBE and MWSBE Goals established by the City for a Contract.
68. **Supplemental SBE, MBE, WBE or MWSBE Goal:** SBE, MBE, WBE or MWSBE goal established for a renewal, amendment or change order to an existing Contract.
69. **WBE:** a Business Enterprise that: (a) is certified by the State of North Carolina as a historically underutilized business within the meaning of N.C. Gen. Stat. 143-128.4, (b) is at least fifty-one percent (51%) owned by one or more persons who are female; and (c) meets the criteria established by the Program Manager from time to time for determining whether the Business is within the City’s relevant market (the Charlotte CSA).
70. **WBE Goal:** A goal established by the City for WBE utilization on a Contract. Calculated as a percentage, the WBE Goal represents the total dollars spent with WBEs as a portion of the total Bid or Proposal amount, including any contingency.
71. **WSBE:** The term “WSBE” is used to refer collectively to SBEs and WBEs. In some contexts it means all SBEs and WBEs, and in other contexts it means one or more categories of SBEs or WBEs.

72. **WSBE Goal:** The term “WSBE Goal” depends on the context. If Contract has separate Subcontracting Goals SBEs and WBEs, the term MWBE Goal is a shorthand way to refer collectively to both the SBE and WBE Goals. In some instances, the City may set one combined goal for SBEs and WBEs on a Contract, in which event the term WSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the WSBE Goal represents the total dollars spent with WSBEs as a portion of the total Bid or Proposal amount, including any contingency.

## **Part B CBI Program**

### **Construction and Commodities Contracts With Subcontracting Goals**

#### **Section 1: Scope**

This document governs bidding on Construction Contracts and Commodities Contracts with SBE, MBE, WBE and/or MWSBE Goals (collectively, "Subcontracting Goals"). Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part B. The City's process for establishing Subcontracting Goals is described in Part A of this Policy and guidelines established by the Program Manager.

#### **Section 2: General Requirements**

- 2.1. When the City sets a Subcontracting Goal for a Construction Contract or Commodities Contract, each Bidder must either: (a) meet each Subcontracting Goal established; or (b) comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5 for each unmet Subcontracting Goal.** For example, if a Contract has an SBE Goal and an MBE Goal, and if the Contractor meets the MBE Goal but not the SBE Goal, the Contractor must demonstrate that it met the Good Faith Negotiation and Good Faith Efforts requirements with respect to the SBE Goal.

The City Solicitation Documents will contain certain forms that Bidders must complete to document having met these requirements. Failure to comply constitutes grounds for rejection of the Bid.

**2.2. Self-Performance.**

**2.2.1. Self-Performance on Construction Contract with MWSBE Goal.** A Bidder that intends to perform 100% of the work on a Construction Contract with an established SBE and/or MWBE Goal may submit an affidavit stating that the Bidder does not customarily subcontract elements of this type project, and normally performs, and has the capability to perform and will perform all elements of work on this Contract with its own current workforces. The affidavit shall be in a form provided by the City as part of the City Solicitation Documents. In such event, the Bidder shall not be required to comply with Section 5. However, if the Bidder is not licensed to perform each and every type of work included in the Contract, or if the City has cause to believe based on past practice or other grounds that the Bidder will not be performing all work under the Contract with its own current workforce, then the City may reject the Bidder's Bid for non-compliance with the CBI Policy.

**2.2.2. Self-Performance on Commodities Contract with MWSBE Goal.** Bidders on a Commodities Contract with an established SBE and/or MWBE Goal are required to meet the SBE and/or MWBE Goal. Bidders that do not meet the SBE and/or MWBE Goal must nevertheless demonstrate that they complied with the Good Faith Negotiation and Good Faith Efforts as set forth in Sections 4 and 5.

- 2.3. No Goals When There Are No Subcontracting Opportunities.** The City shall not establish Subcontracting Goals for Contracts where: a) there are no subcontracting opportunities identified for the Contract; or b) there are no SBEs, MBEs or WBEs (as applicable) to perform scopes of work or provide products or services that the City regards as realistic opportunities for subcontracting.

- 2.4. Mandatory Subcontracting Provision.** Section 8.82 of the Charlotte City Charter authorizes the Charlotte City Council to establish specifications requiring Contractors to subcontract a certain percentage of the work in Construction Contracts. City Council may from time to time elect to exercise this authority to enhance SBE, MBE and/or WBE participation in Construction Contracts when it determines that doing so is reasonably practicable in light of industry practice and consistent with the City's best interests. If City Council establishes mandatory subcontracting requirements for a Construction Contract, all Bidders submitting Bids or Proposals on the Contract shall be required to: (a) subcontract the amount of work specified by City Council; and (b) use Good Faith Efforts to subcontract such work to meet the SBE, MBE and WBE Goals established for the Contract. In the event a Contractor is unable to subcontract the designated percentage of work to SBEs, MBEs or WBEs, the Contractor shall nevertheless be required to subcontract the designated percentage of work to other third party contractors.
- 2.5. City Outreach.** At least 10 days before Bid Opening on each Construction Contract or Commodities Contract for which an MBE or WBE Goal has been set, the City will send a "Project Notice" to all MWBEs in the applicable categories that have registered with the City under Part E as performing the type of work being bid. If an SBE Goal has been set for the Contract, the City will also send a Project Notice to all SBEs that are certified in the areas where the City anticipates subcontracting on the project. The Project Notice will include:
- A description of the work for which the bid is being solicited;
  - The date, time and location where Bids are to be submitted;
  - The name of the individual at the City who will be available to answer questions about the Contract;
  - Where the City Bid documents may be reviewed; and
  - Any special requirements that may exist.
- For each Construction Contract of \$300,000 or more, the City will also:
- Make available (by email, posting on the City's website or other means) a list of Bidders that have picked up or requested the City Solicitation Documents for the project;
  - Attend the scheduled pre-bid conference; and
  - Utilize other media, as appropriate, likely to inform potential SBEs and MWBEs, as applicable, of the Bids being sought.
- 2.6. Quick Pay Commitment.** Any Bidder for a Construction Contract or Commodities Contract, who offers a Quick Pay Commitment to any MWSBE Subcontractor in its solicitation efforts, shall not rescind the Quick Pay Commitment. If a Bidder does rescind the offer of a Quick Pay Commitment after being awarded the Contract, then the City shall be entitled to exercise any of the remedies set forth in Part D, Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

### **Section 3: Meeting Subcontracting Goals**

- 3.1.** The City will give Bidders credit toward meeting the Subcontracting Goals at bid only for those SBEs and MWBEs that:
- 3.1.1. Are certified with the City as SBEs or MWBEs as of the Proposal due date; and**
  - 3.1.2. With respect to MWBEs, are listed in the City's Vendor Management System as being at least 51% owned by individuals in one of the MWBE categories included in the MBE or WBE Goal set for that project** (for instance, if a MBE Goal has been set for African American, Native American and Hispanic MBEs, subcontracts awarded to Asian MBEs will not count toward the MBE Goal); and
  - 3.1.3. Will actually perform a Commercially Useful Function** as defined in Part A (which means, among other things, an SBE or MWBE acting solely as a Conduit will not be counted); and
  - 3.1.4. Will perform within the area(s) for which they are certified** unless the Bidder provides documentation satisfactory to the City showing that the SBE or MWBE has performed similar work in the past. Documentation to satisfy this requirement may include invoices showing the SBE or MWBE has previously performed such work.

**If an MBE or WBE is also certified as an SBE, a Bidder may receive credit toward both the SBE Goal and either the MBE or WBE Goal (as applicable). However, if an MBE is also a WBE, then the Business Enterprise shall be counted as an MBE but not a WBE.**

The City will not give credit toward Subcontracting Goals for subcontracting to SBEs or MWBEs that are found to be Affiliates of the Bidder prior to Bid Opening. If an SBE or MWBE is decertified between Bid Opening and Contract award, the City will not allow credit toward the Subcontracting Goal for amounts committed to that SBE or MWBE, but will allow the Bidder to replace the decertified SBE or MWBE with a certified SBE or MWBE, unless the certification was based on false or fraudulent information of which the Bidder had or should have had knowledge. However, the City may refuse to allow the substitution and reject the Bid if the SBE or MWBE is decertified for being an Affiliate, or is found to be an Affiliate of the Bidder (even if not decertified), if the City determines in its sole discretion that the Bidder knew or should have known prior to Bid Opening that there was a significant risk that the City would consider the SBE or MWBE an Affiliate. Bidders shall be deemed to have knowledge of all CBI Program provisions, including those relating to Affiliates.

A City MWSBE may count the work it intends to perform, with its own current workforces, towards the MWSBE Subcontracting Goals to the extent the requirements set forth in this Section are satisfied and the amount of the Construction Contract is under \$500,000.

- 3.2. Using SBEs and MWBEs the City Did Not List in City Solicitation Documents.** Bidders shall receive credit for using SBEs and MWBEs that the City did not list in the City Solicitation Documents, as long as the requirements of Section 3.1 are met.
- 3.3. Calculating SBE or MWBE Participation Based on Type.** The City shall count SBE and MWBE participation on a Construction Contract as set forth below.
- 3.3.1. Subcontractor:** If the Bidder utilizes an SBE or MWBE as a Subcontractor to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE or MWBE performs toward satisfaction of the Subcontracting Goals, except to the extent the SBE or MWBE performs services as a Regular Dealer, Hauler, Broker or Packager (in which event the amount counted will be determined by the applicable Section below).
- 3.3.2. Manufacturer:** The City shall count 100% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Manufacturer toward the Subcontracting Goals.
- 3.3.3. Regular Dealer:** The City shall count 60% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Regular Dealer toward the Subcontracting Goals.
- 3.3.4. Hauler, Broker or Packager:** The City shall count fees or commissions charged by an SBE or MWBE Hauler, Broker or Packager for providing a Commercially Useful Function toward the Subcontracting Goals, provided that the Program Manager determines that the fee or commission is reasonable and not excessive as compared with fees customarily charged for similar services. A Hauler may or may not take title to the materials or supplies it delivers. Either way, the cost of such materials and supplies shall not count as part of the Hauler's fees or commissions for purposes of this Section.
- 3.4. Documenting SBE and MWBE Participation.** The City may **only** give Bidders credit toward the Subcontracting Goals for SBE or MWBE participation that is:
- Listed on the **Utilization and GFE Affidavit** (as defined in Section 3.5) submitted with the Bid; and
  - Documented by a **Letter of Intent Form** (as defined in Section 3.6), that is submitted to the City within the time period set forth in Section 3.6.

- 3.5. Utilization and GFE Affidavit.** The City Solicitation Documents for each Construction Contract will include a form affidavit that: (a) captures information regarding the SBEs, MWBEs and other subcontractors and suppliers that the Bidder intends to use on the Contract and (b) lists the Good Faith Efforts undertaken by the Bidder to meet the Subcontracting Goals (the "Utilization and GFE Affidavit"). Failure to properly complete and submit the Utilization and GFE affidavit with the Bid constitutes grounds for rejection of the Bid.
- 3.6. Letter of Intent.** Within **3 Business Days** after receiving a request from the City, Bidders must submit a separate Letter of Intent form for each SBE and MWBE listed in the Utilization and GFE Affidavit. Bidders may use the Letter of Intent that the City provides with the City Solicitation Documents or may use an alternative form if it contains the same information as the City's form. Regardless of the form, each Letter of Intent must be executed by both the SBE or MWBE and the Bidder. The City shall not count proposed SBE or MWBE utilization for which it has not received a Letter of Intent by this deadline unless the SBE or MWBE certifies to the City that it originally agreed to participate in the Contract at the level reported by the Bidder, but subsequently declined to do so.

#### **Section 4: Good Faith Negotiation**

- 4.1. Bidders that fail to meet an SBE, MBE, WBE or MWSBE Goal must comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5 with respect to each unmet Subcontracting Goal.** Failure to do so constitutes grounds for rejection of the Bidder's Bid.
- 4.2. Good Faith Negotiation.** All Bidders that fail to meet a Subcontracting Goal must negotiate in good faith with each SBE and each applicable MWBE that responds to the Bidder's solicitations or contacts the Bidder on its own accord with respect to the unmet Goal ("Interested SBEs and MWBEs"). Applicable MWBE means one certified in a category for which a Subcontracting Goal was set.
- 4.3. Failure to Negotiate In Good Faith.** The City may find that a Bidder did not meet its Good Faith Negotiation obligation if in the City's judgment, the Bidder rejects an Interested SBE's or MWBE's bid for reasons other than: (a) the SBE's or MWBE's bid was higher than what was proposed by the subcontractor or supplier the Bidder decided to use; (b) the SBE or MWBE was not "Qualified" as defined in Part A, Appendix 1; or (c) the Business Enterprise that will be performing in place of the Interested SBE or MWBE is more qualified than the Interested SBE or MWBE, to the extent that such difference in qualification would materially impact the Bidder's Bid, or (d) there was a material deficiency with the Interested SBE's or MWBE's bid (such as it being submitted late, containing inaccurate information, etc.). To document Good Faith Negotiation, Bidders must complete a form that will be included in the City Solicitation Documents. The City may also request on a case-by-case basis documentation sufficient in the City's judgment to prove that the Bidder's reasons for rejecting an Interested SBE or MWBE are valid. Bidders must provide such forms and information within the time period specified by the City. Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation Requirements") shall constitute grounds for rejecting a Bid. Notwithstanding the forgoing, Bidders participating in a mentor / protégé program recognized by the MWSBE Office may reject an Interested SBE's or MWBE's bid for work that is being performed by the Bidder's SBE or MWBE mentee or SBE or MWBE protégé, subject to approval of the CBI Program Manager.

#### **Section 5: Good Faith Efforts**

- 5.1. If a Bidder has not fully met each Subcontracting Goal established for a Contract, then it must document that it has made Good Faith Efforts with respect to each unmet Goal.** Failure to do so constitutes grounds for rejection of the Bid. "Good Faith Efforts" are referred to in this Section as "GFEs".

**5.2. Minimum GFE Points.** For each unmet Subcontracting Goal on a Contract, a Bidder must earn at least 50 GFE points from the GFE categories described in Section 5.3 (the “Minimum GFE Points”). The Program Manager may change the Minimum GFE Points from time to time or with respect to certain Contracts, and may add, exclude or modify certain GFE categories based on the nature and amount of the Contract.

**5.3. GFE Categories.** Bidders that fail to meet one or more of the Subcontracting Goals established for a Contract must earn the Minimum GFE Points from the GFEs listed below. The Minimum GFE Points will be calculated, independently, for each Subcontracting Goal that was unmet. For instance, if a Bidder failed to meet both the SBE Goal and an MBE Goal that was set with respect to African American, Native American and Hispanic firms, the Bidder would have to earn at least 50 points from the list below with respect to SBEs, and at least 50 points with respect to MBEs (the latter being African American, Native American and Hispanic firms combined).

In deciding whether to award points for GFEs, the City will assess whether the efforts employed by the Bidder are those that a prime contractor would reasonably be expected to take if actively and aggressively trying to meet each Subcontracting Goal established for the Contract. This assessment will be made on a case by case basis taking all available facts into account. The focus will be on the likely effectiveness of steps taken. Mere pro forma efforts will not be sufficient.

In awarding points for GFEs, the City may also take into account: (1) the Bidder's past performance in meeting MWBE and SBE goals; and (2) the performance of other Bidders in meeting the established Subcontracting Goals on the Contract up for award. For example, when the apparent low bidder fails to meet a Subcontracting Goal, but other Bidders meet it, the City may reasonably raise the question of whether, with additional reasonable efforts the apparent low Bidder could have met the goal.

**5.3.1. Contacts (10 Points).** The Bidder must contact SBEs and MWBEs in a manner reasonably calculated to meet each Subcontracting Goal established for the Contract. Factors considered may include but are not limited to:

- (a) The number of available SBEs and MWBEs contacted;
- (b) Whether the Bidder directed its contacts to SBEs and MWBEs listed as performing scopes of work sufficient to meet each Subcontracting Goal;
- (c) Whether the contacts were made at least **10 Days** before Bid Opening;
- (d) How the contacts were made and whether they were documented in a verifiable way (and in compliance with any forms provided by the City);
- (e) Whether the substance of the Bidder's solicitation was reasonably sufficient to generate a response from SBEs and MWBEs;
- (f) Whether the Bidder promptly and adequately responded to inquiries received from SBEs and MWBEs; and
- (g) Whether the Bidder made follow up contacts to SBEs and MWBEs that did not respond to the Bidder's initial contact.

**5.3.2 Making Plans Available (10 Points).** To receive credit for this GFE, the Bidder must: (i) make “Project Documents” (as defined below) available for inspection by SBEs and MWBEs at least **10 Days** before Bid Opening; and (ii) notify the SBEs and MWBEs contacted under GFE 5.3.1 of the way in which Project Documents will be made available. As used herein, Project Documents means any project descriptions, construction plans, specifications or requirements that are necessary for SBEs and MWBEs to bid on the project. The ways a Bidder may make Project Documents available include:

- (a) Providing a telephone number or email address for requesting copies of the Project Documents via email, fax, regular mail or other means of document transfer; or
- (b) Providing an address within the Charlotte CSA where SBEs and MWBEs can have physical access to review the Project Documents at no cost; or
- (c) Posting the Project Documents on a website that SBEs and MWBEs can access at no cost.



**A Bidder may receive credit for GFE 5.3.2 only if it receives credit for GFE 5.3.1 (Contacts), and only if it responds promptly to any requests made for access to the Project Documents.** Some plans and designs for City buildings and infrastructure may be restricted from disclosure under federal Homeland Security laws. If the City Solicitation Documents indicate that the Project Documents are restricted from disclosure, the Bidder shall comply with the City's instructions in making such documents available for review. For example, the City Solicitation Documents may require that SBEs and MWBEs sign a confidentiality agreement in a form approved by the City as a condition to disclosure.

**5.3.3. Breaking Down Work (15 Points).** The Bidder must demonstrate to the City's satisfaction that it broke down or combined elements of work into economically feasible units to facilitate SBE and MWBE participation. In awarding points the City will consider the number and dollar value of the scopes of work the Bidder listed in its written invitation to bid for SBE / MWBE participation, whether those scopes would be sufficient to meet the Subcontracting Goals and how the Bidder notified SBEs and MWBEs of its willingness to break down the work into such units. Simply restating the City's subcontracting scopes as listed in the City's RFP is not sufficient to earn this GFE, but rather Primes must provide written documentation to demonstrate negotiations with MWSBEs to breakdown or combine elements of work. **A Bidder may receive credit for this GFE only if it receives credit for GFE 5.3.1 (Contacts).**

**5.3.4. Working With SBE and MWBE Assistance Organizations (10 Points).** The Bidder must document that it worked with an SBE Assistance Organization and/or MWBE Assistance Organization (both as defined below), as applicable, to provide assistance in recruiting SBEs and MWBEs for the Contract for which Bids are sought.

- **A MWBE Assistance Organization** is an organization identified by the North Carolina Office of Historically Underutilized Businesses and listed in the City Solicitation Documents as providing assistance in the recruitment of MWBEs.
- **An "SBE Assistance Organization"** is an organization identified by the City of Charlotte and listed in the City Solicitation Documents as providing assistance in the recruitment of SBEs.

In deciding whether to award points for this GFE, the City will consider the timing and nature of how the Bidder worked with the SBE or MWBE Assistance Organization, and whether such effort was reasonably likely to result in significant SBE/MWBE participation for the Contract at issue.

**5.3.5. Attendance at Pre-Bid (10 Points).** To receive credit for this GFE, the Bidder must attend pre-bid meetings scheduled by the City for the Contract in question.

**5.3.6. Bonding or Insurance Assistance on Construction Contract (20 Points).** The Bidder must assist an SBE or MWBE in getting required bonding or insurance coverage for the Contract at issue or provide alternatives to bonding or insurance for SBEs and MWBEs. To document satisfaction of this GFE, the Bidder must submit: (a) the name of the SBE or MWBE; (b) a description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; (d) the name of a contact person with the SBE or MWBE who can verify that the Bidder provided the assistance; and (e) any additional information requested by the City. No credit will be given for assistance provided to an Affiliate of the Bidder. In deciding whether to award points for this GFE, the City will consider how significant and meaningful the assistance was, how many SBEs and MWBEs it was offered to, and what impact it likely had on the Bidder's efforts to recruit SBEs and/or MWBEs for the project.

- 5.3.7. Negotiating in good faith with MWBEs and SBEs (15 Points).** The Bidder must: (a) demonstrate that it negotiated in good faith with interested SBEs and MWBEs (which means showing at least some back and forth negotiation between the Bidder and SBEs or MWBEs); (b) demonstrate that it did not reject any SBEs or MWBEs as unqualified without sound reasons based on their capabilities; (c) document in writing the reasons for rejecting any SBEs or MWBEs for lack of qualification.
- 5.3.8. Financial Assistance (25 Points).** The Bidder must provide one of the following types of assistance to an SBE or MWBE in connection with the Contract: (a) assistance in obtaining equipment, a loan, capital, lines of credit, (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Bidder's suppliers as the Bidder. To receive credit for this GFE, Bidders must document: (a) the name of the SBE or MWBE; (b) the description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; and (d) the name of a contact person with the SBE or MWBE who can verify that the Bidder provided the assistance. No credit will be given for assistance provided to an Affiliate of the Bidder. In deciding whether to award points for this GFE, the City will consider how significant and meaningful the assistance was, how many SBEs and MWBEs it was offered to, and what impact it likely had on the Bidder's efforts to recruit SBEs and/or MWBEs for the project.
- 5.3.9. Entering Into Joint Venture (20 Points).** To receive credit for this GFE, the Bidder must demonstrate that it negotiated a Joint Venture or partnership arrangement with one or more MWBEs and/or SBEs, as applicable, on the Contract. To receive credit for this GFE, Bidders must document: (a) the name of the MWBE and/or SBE; (b) a description of the Joint Venture or partnership; (c) evidence of the date the SBE and/or MWBE entered into the agreement; and (d) the name of a contact person with the SBE and/or MWBE who can verify the terms of the agreement. No credit will be given for a joint venture with an Affiliate of the Bidder.
- 5.3.10. Quick Pay Commitment on Contracts Up For Award (20 Points).** To receive credit for this GFE, Bidders must provide the City with: (i) a copy of the Bidder's Quick Pay Commitment related to the specific project; (ii) documentation indicating that all MWSBEs notified under GFE 5.3.1 Contacts have received a written copy of the Bidder's Quick Pay Commitment prior to the Bid opening (see Quick Pay Commitment definition in CBI Policy, Part A, Appendix 1). Bidders will not receive credit for this GFE if: (i) the Quick Pay Commitment has a statement indicating that the Bidder *will consider* entering into a Quick Pay Commitment; or (ii) the Bidder only verbally communicated the Quick Pay Commitment to the Subcontractor. **A Bidder may receive credit for this GFE only if it receives credit for GFE 5.3.1 (Contacts).**

In addition to the above, the City may also take into account: (1) the Proposer's past performance in meeting MWBE and SBE goals; and (2) the performance of other Proposers in meeting the established Subcontracting goals on the Contract up for award. For example, when a Proposer fails to meet a Subcontracting Goal, but other Proposers meet it, the City may reasonably raise the question of whether, with additional reasonable efforts the Proposer in question could have met the goal.

- 5.4. GFE Documentation.** To demonstrate GFE compliance, a Bidder shall complete such forms and provide such documentation as may be required by the City in the City Solicitation Documents or requested by the City at any time (the "GFE Documentation"). The Bidder must submit the GFE Documentation within the time specified by the City. If the City does not specify a time, the Bidder must submit GFE Documentation within **3 Business Days** after the City requests it. The City may request GFE Documentation from all Bidders, or may limit such request to one Bidder or a group of Bidders (including the lowest Bidders, a group of randomly selected Bidders, Bidders that have had compliance issues in the past or such other categories as the City may deem appropriate).

Regardless of when the GFE Documentation is due, **all actions necessary to earn the GFE points must be undertaken prior to Bid Opening.**

## Section 6: Waivers

- 6.1.** Failure to comply with Part B of the CBI Program may be waived only in accordance with this Section. Notwithstanding anything contained herein to the contrary, the waivers referenced in this Section may be granted by the Program Manager or the Program Manager's designee, by the City Manager or the City Manager's designee, or by City Council.
- 6.2. Waiver of Good Faith Efforts and Good Faith Negotiation.** The Program Manager shall be entitled (but not required) to waive the Good Faith Efforts and the Good Faith Negotiation requirements in a situation where the lowest Bidder failed to comply with the Good Faith Efforts and Good Faith Negotiation requirements ("Non-Compliant Bidder") but has proposed SBE and/or MWBE utilization for the unmet Subcontracting Goal(s) that is greater than that proposed by the next lowest Bidder that complied with the Good Faith Efforts and the Good Faith Negotiation requirements and would otherwise be awarded the Contract ("Compliant Bidder"). In determining whether to grant such waiver, the Program Manager will take into account:
- (a) The cost difference to the City between the two Bids;
  - (b) The difference in the level of SBE and/or MWBE utilization proposed by the Compliant and Non-Compliant Bidders;
  - (c) The level of effort the Compliant and Non-Compliant Bidders undertook to meet the Good Faith Efforts requirements;
  - (d) Past efforts by the Non-Compliant Bidder to meet Subcontracting Goals on City projects (i.e., whether the Bidder has consistently proposed lower SBE and/or MWBE participation than other Bidders on similar projects);
  - (e) Instances of past non-compliance with the Good Faith Efforts requirements on the part of the Non-Compliant Bidder; and
  - (f) Any other factors deemed relevant by the Program Manager.
- 6.3. Minor Non-Compliance Waiver.** In addition to and without limiting the Program Manager's power and authority to grant waivers under Section 6.2, the Program Manager shall have the power and authority to waive non-compliance with this Program if:
- 6.3.1.** The non-compliance is minor in nature
  - 6.3.2.** Waiving the non-compliance would not put Bidders that complied with the CBI Program at a competitive disadvantage; and
  - 6.3.3.** The non-compliance does not reflect a continued lack of diligence on the Bidder's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more bids might be deemed a lack of diligence in complying with the Program.
- 6.4. General Information About Waivers.** The waivers referenced in Section 6 may be granted without notice to City Council. Nothing in Section 6 shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

## Section 7: Extensions

The Program Manager may grant a written extension of any deadline set forth in this Section. No extension shall be valid unless documented in writing by the City.

## Section 8: False Statements or Certifications

It shall be a violation of the CBI Program, and grounds for rejection of a Bid and other sanctions for any Bidder to make a false or materially misleading statement, or certification regarding any matter relevant to the CBI Program.

**Section 9: Expectations for MWSBEs**

MWSBEs are responsible for promoting themselves and taking the initiative to obtain work on City Contracts. Specifically, MWSBEs shall:

- Monitor the City's website for posting of contracting opportunities;
- Make every effort to establish contacts and relationships with prospective Bidders for potential future business, including attending pre-bid conferences;
- Respond promptly to solicitation requests; and
- Attend seminars, classes and workshops designed to facilitate networking and/or enhance business skills.

## **Part C CBI Program**

### **Service Contracts**

#### **Section 1: Scope**

This document covers SBE and MWBE outreach for Service Contracts. Service Contracts include any Contracts in which a Business Enterprise agrees to provide services to the City other than construction. Examples include Contracts for architectural, engineering, surveying or construction management services, janitorial services, computer consulting and language interpretation. Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part C. The City's process for establishing MBE, WBE, SBE and/or MWSBE Goals (collectively, "Subcontracting Goals") for Service Contracts is described in Part A of this Policy and guidelines established by the Program Manager.

#### **Section 2: General Requirements**

**2.1.** For Service Contracts, the City may choose one or more of the following SBE and MWBE outreach options:

- (a) **Subcontracting Goals.** The City may set an SBE Goal for the Contract. The City may also set MBE, WBE and MWSBE Goals for the Contract, but only for those categories of firms that have experienced discrimination in the Charlotte CSA and have been adversely impacted in their ability to obtain Service Contracts with the City, as documented by the City. The City shall not establish Subcontracting Goals for Service Contracts where: (a) there are no subcontracting opportunities identified for the Contract; or (b) there are no SBEs or MWBEs (as applicable) certified to perform the scopes of work that the City regards as realistic opportunities for subcontracting
- (b) **Stated Commitment and Utilization Affidavit.** The City may require each Proposer to submit with its Proposal or otherwise: (a) the Proposer's Committed Subcontracting Goals; and (b) an affidavit listing the SBEs and MWBEs it intends to use on the Contract and any related information requested by the City (the "Utilization Affidavit").
- (c) **Participation Plan.** The City may require the Proposer to submit a Participation Plan describing how it intends to solicit SBE and MWBE participation on the Contract (the "Participation Plan"). The City may provide a form for the Participation Plan, or may specify what it needs to include.
- (d) **Good Faith Negotiation.** The City may require Proposers to complete forms or provide documentation of having complied with the Good Faith Negotiation requirements set forth in Section 4.
- (e) **GFE Affidavit.** The City may require the Proposer to submit a statement of the Good Faith Efforts that it undertook to secure SBE and/or MWBE participation in the Contract (the "GFE Affidavit"). Good Faith Efforts are defined in Section 5. The City may require a specific form for the GFE Affidavit, or may specify what it needs to include.
- (f) **GFE Documentation.** A Proposer shall complete such forms and provide such documentation as may be required by the City in the City Solicitation Documents or requested by the City at any time to document the GFEs undertaken (the "GFE Documentation"). The Proposer must submit the GFE Documentation within the time specified by the City. If the City does not specify a time, the Proposer must submit GFE Documentation within **3 Business Days** after the City requests it. The City may request GFE Documentation from all Proposers, or may limit such request to one Proposer or a group of Proposers (including the lowest Proposers, a group of randomly selected Proposers, Proposers that have had compliance issues in the past or such other categories as the City may deem appropriate).

- (g) **Letter of Intent.** The City may require each Proposer to submit a separate Letter of Intent for each SBE and MWBE listed in the Utilization Affidavit toward meeting a Subcontracting Goal. Proposers may use the Letter of Intent form that the City provides with the City Solicitation Documents or may use an alternative form if it contains the same information as the City's form. Regardless of the form, each Letter of Intent must be executed by both the SBE or MWBE and the Proposer.
- (h) **Negotiated Goals.** The City may seek to negotiate Subcontracting Goals after Proposals have been submitted, provided that the City shall only seek to negotiate MBE, WBE and MWSBE goals for those categories of firms that have experienced discrimination in the Charlotte CSA and have been adversely impacted in their ability to obtain Service Contracts with the City, as documented by the City.

**2.2. Submission Requirements and Consideration.** The documentation that the City requires for a particular Contract under Section 2.1 is called the "MWSBE Outreach Documentation." The City may require Proposers to submit their MWSBE Outreach Documentation with their Proposals or at any time specified by the City. Unless the City specifies another deadline in writing, Proposers shall submit it within three (3) days after receiving a request from the City. The City may consider the Proposer's MWSBE Outreach Documentation as a factor in the evaluation process, and may exclude a Proposal from further consideration if the City determines that the Proposer has not provided required documentation, has not made adequate Good Faith Efforts (if applicable), has not met the Good Faith Negotiation Requirements (if applicable) or has failed to provide a reasonable Participation Plan (if applicable). Such determination may occur before or after the Proposal is sent to the City evaluation committee.

**2.3. Self-Performance.** Self-Performance does not exempt Proposers from meeting the requirements of the CBI Program for Service Contracts.

Proposers that elect to fully self-perform a Service Contract where the City has set a Subcontracting Goal must comply with each of the following provisions. Failure to do so will be considered as a factor in the Proposal evaluation process and may result in a Proposal being excluded from consideration:

- (a) The Proposer must certify in its Proposal that: (i) it is licensed, qualified and able to perform all aspects of the Contract without subcontracting; and (ii) it has a valid business reason for self-performing all work on the Contract as opposed to subcontracting. The Proposal must describe the valid business reason for self performing, and the Proposer must submit **with its Proposal** documentation sufficient to demonstrate to the City's reasonable satisfaction the validity of such assertions. Valid business reasons include: (a) special skill-based qualifications that the available SBEs and MWBEs do not possess or (b) a significant increase in the cost for SBE or MWBEs to perform the scope of work instead of the Proposer, or (c) such other factors as the Program Manager may deem valid in a particular instance. Proposers that intend to self-perform are encouraged to gather their documentation and approach the CBI Program Manager at least **14 days** prior to the Proposal due date to obtain clearance for self performance.
- (b) SBEs and MWBEs may approach the Proposer about possible subcontracting or subconsulting opportunities on the project by virtue of having received notice from the City or through other means. In such event, the Proposer must comply with the Good Faith Negotiation requirements of Section 4 in evaluating and responding to any SBE or MWBE quotes or inquiries the Proposer receives in connection with the project.
- (c) The Proposer must submit copies of any quotes the Proposer receives from Interested SBEs and MWBEs with the Proposer's Proposal, along with a comparison of the SBEs and/or MWBE's quote with the Proposer's costs and expenses for doing such work.

- 2.4. **Quick Pay Commitment.** Any Bidder for a Construction Contract or Commodities Contract, who offers a Quick Pay Commitment to any MWSBE Subcontractor in its solicitation efforts, shall not rescind the Quick Pay Commitment. If a Bidder does rescind the offer of a Quick Pay Commitment after being awarded the Contract, then the City shall be entitled to exercise any of the remedies set forth in Part D, Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

### **Section 3: Meeting Subcontracting Goals**

- 3.1. The City will give Proposers credit towards meeting the Subcontracting Goals at bid only for those SBEs and MWBEs that
- 3.1.1. **Are Certified with the City as SBEs or Registered as MWBEs as of the Proposal due date;** and
  - 3.1.2. **With respect to MWBEs,** are listed in the City's Vendor Management System as being at least 51% owned by individuals in one of the MWBE categories included in the MBE or WBE Goal set for that Contract (for instance, if a MBE Goal has been set for African American and Hispanic MBEs, subcontracts awarded to Asian MBEs will not count toward the MBE Goal); and
  - 3.1.3. **Will actually perform a Commercially Useful Function** as defined in Part A (which means, among other things, an SBE or MWBE acting solely as a Conduit will not be counted); and
  - 3.1.4. **Will perform within the area(s) for which they are certified** unless the Proposer provides documentation satisfactory to the City showing that the SBE or MWBE has performed similar work in the past. Documentation to satisfy this requirement may include invoices showing the SBE or MWBE has previously performed such work.

**If an MBE or WBE is also certified as an SBE, a Bidder may receive credit toward both the SBE Goal and either the MBE or WBE Goal (as applicable). However, if an MBE is also a WBE, then the Business Enterprise shall be counted as an MBE but not a WBE.**

The City will not give credit toward Subcontracting Goals for subcontracting to SBEs or MWBEs that are found to be Affiliates of the Proposer prior to the Proposal due date. If an SBE or MWBE is decertified between the Proposal due date and Contract award, the City will not allow credit toward the Subcontracting Goal for amounts committed to that SBE or MWBE, but will allow the Proposer to replace the decertified SBE or MWBE with a certified SBE or MWBE unless the certification was based on false or fraudulent information of which the Proposer had or should have had knowledge. However, the City may refuse to allow the substitution and reject the Proposal if the SBE or MWBE is decertified for being an Affiliate, or if the SBE or MWBE is found to be an Affiliate of the Proposer (even if not decertified), if the City determines in its sole discretion that the Proposer knew or should have known prior to the Proposal due date that there was a significant risk that the City would consider the SBE or MWBE an Affiliate. Proposers shall be deemed to have knowledge of all CBI Program provisions, including those relating to Affiliates.

A City MWSBE may count the work it intends to perform with its own current workforces towards the MWSBE Subcontracting Goals to the extent the requirements set forth in this Section are satisfied and the amount of the Services Contract is under \$200,000.

- 3.2. **Using SBEs and MWBEs the City Did Not List in City Solicitation Documents.** Proposers shall receive credit for using SBEs and MWBEs that the City did not list in the City Solicitation Documents, as long as the requirements of Section 3.1 are met.
- 3.3. **Calculating SBE or MWBE Participation Based on Type.** The City shall count SBE and MWBE participation on a Service Contract as set forth below.

- 3.3.1. Subconsultant or Subcontractor:** If the Proposer utilizes an SBE or MWBE as a **subconsultant** or **subcontractor** to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE or MWBE performs toward satisfaction of the Subcontracting Goals, except to the extent the SBE or MWBE is performing services as a Regular Dealer, Hauler, Broker or Packager (in which event the amount counted will be determined by the applicable Section below).
- 3.3.2. Manufacturer:** The City shall count 100% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Manufacturer toward the Subcontracting Goals.
- 3.3.3. Regular Dealer:** The City shall count 60% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Regular Dealer toward the Subcontracting Goals.
- 3.3.4. Hauler, Broker or Packager;** The City shall count fees or commissions charged by an SBE or MWBE Broker or Packager for providing a Commercially Useful Function toward the Subcontracting Goals, provided that the Program Manager determines that the fee or commission is reasonable and not excessive as compared with fees customarily charged for similar services.
- 3.3.5. Joint Venture:** In order for the Department to count SBE or MWBE participation in a Joint Venture toward achievement of Subcontracting Goals, the Proposer shall submit the Joint Venture proposal to the Program Manager at least **10 Business Days** before submitting its Proposal. The CBI Program Manager will review the proposal and, assuming that the Proposer does not need to provide more information, the Program Manager will inform the Proposer at least **5 Business Days** before the Proposal due date whether the City will be able to count the SBE's or MWBE's participation toward the Subcontracting Goals.

SBE and/or MWBE participation by the SBE and/or MWBE Joint Venturer will be calculated as provided above, based on whether the SBE or MWBE Joint Venturer will be performing a role most similar to that of a Subcontractor, Regular Dealer, Manufacturer, Broker or Packager. For instance, if an SBE Joint Venturer's role is most similar to that of a Subcontractor, 100% of the value of the Commercially Useful Function performed by the SBE will count toward the SBE Goal.

#### **Section 4: Good Faith Negotiation**

- 4.1.** When one or more Subcontracting Goals are set for a Contract, Proposers that fail to fully meet such goals must negotiate in good faith with each SBE and each applicable MWBE that responds to the Proposer's solicitations or contacts the Proposer on its own accord ("Interested SBEs and MWBEs"). Applicable MWBE means one certified in a category for which a Subcontracting Goal was identified. The City may also require that Proposers comply with this Section in the absence of Subcontracting Goals.



- 4.2. Failure to Negotiate In Good Faith.** The City may find that a Proposer did not meet its Good Faith Negotiation obligation if in the City's judgment, the Proposer rejects an Interested SBE's or MWBE's proposal for reasons other than: (a) the SBE's or MWBE's proposal was higher than what was proposed by the subcontractor or supplier the Proposer decided to use; (b) the SBE or MWBE was not "Qualified" as defined in Part A, Appendix 1; or (c) the Business Enterprise that will be performing in place of the Interested SBE or MWBE is more qualified than the Interested SBE or MWBE, to the extent that such difference in qualification would materially impact the Proposer's Proposal, or (d) there was a material deficiency with the Interested SBE's or MWBE's proposal (such as it being submitted late, containing inaccurate information, etc.). To document Good Faith Negotiation, the City may require Proposers to complete a form that will be included in the City Solicitation Documents. The City may also request on a case-by-case basis documentation sufficient in the City's judgment to prove that the Proposer's reasons for rejecting an Interested SBE or MWBE are valid. Proposers must provide such forms and information within the time period specified by the City. Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation Requirements") shall constitute grounds for rejecting a Proposal. Notwithstanding the foregoing, Proposers participating in a mentor / protégé program recognized by the MWSBE Office may reject an Interested SBE's or MWBE's bid for work that is being performed by the Proposer's SBE or MWBE mentee or SBE or MWBE protégé, subject to approval of the CBI Program Manager.

### **Section 5: Good Faith Efforts**

When the City requires a GFE Affidavit, the GFEs undertaken by the Proposer will be considered as a factor in the evaluation process. Failure to make reasonable GFEs may result in rejection of the Proposer's Proposal. The City will assess the reasonableness of GFEs undertaken by the Proposer on a case by case basis taking all available facts into account. The focus will be on the likely effectiveness of steps taken. Mere pro forma efforts will not be sufficient. Factors that may be considered include but are not limited to the following:

- 5.1 Contacts.** Did the Proposer contact SBEs and MWBEs in a manner reasonably calculated to meet each Subcontracting Goal established for the Contract? Factors considered may include but are not limited to:
- (a) The number of available SBEs and MWBEs contacted;
  - (b) Whether the Proposer directed its contacts to SBEs and MWBEs listed as performing scopes of work sufficient to meet each Subcontracting Goal;
  - (c) Whether the contacts were made at least **10 Days** before the Proposal due date;
  - (d) How the contacts were made and whether they were documented in a verifiable way (and in compliance with any forms provided by the City);
  - (e) Whether the substance of the Proposer's solicitation was reasonably sufficient to generate a response from SBEs and MWBEs;
  - (f) Whether the Proposer promptly and adequately responded to inquiries received from SBEs and MWBEs; and
  - (g) Whether the Proposer made follow up contacts to SBEs and MWBEs that did not respond to the Proposer's initial contact.
- 5.2 Making Plans Available.** Did the Proposer make the documents necessary to propose available for inspection by SBEs and MWBEs at least **10 Days** before the Proposal due date? Also, did the Proposer notify the SBEs and MWBEs in a timely manner regarding how and where such documents would be made available? Note that some plans and designs for City buildings and infrastructure may be restricted from disclosure under federal Homeland Security laws. If the City Solicitation Documents indicate that such documents are restricted from disclosure, the Proposer shall comply with the City's instructions in making such documents available for review. For example, the City Solicitation Documents may require that SBEs and MWBEs sign a confidentiality agreement in a form approved by the City as a condition to disclosure.
- 5.3 Breaking Down Work.** Did the Proposer break down or combine elements of work into economically feasible units to facilitate SBE and MWBE participation?

- 5.4 Working With SBE and MWBE Assistance Organizations.** Did the Proposer document that it worked with an SBE Assistance Organization and/or MWBE Assistance Organization (both as defined below), as applicable, to provide assistance in recruiting SBEs and MWBEs for the Contract?
- **A MWBE Assistance Organization** is an organization identified by the North Carolina Office of Historically Underutilized Businesses and listed in the City Solicitation Documents as providing assistance in the recruitment of MWBEs.
  - **An “SBE Assistance Organization”** is an organization identified by the City of Charlotte and listed in the City Solicitation Document as providing assistance in the recruitment of SBEs.
- 5.5 Attendance at Pre-Proposal.** Did the Proposer attend any pre-Proposal meetings scheduled by the City for the Contract?
- 5.6 Bonding or Insurance Assistance on a Contract.** Did the Proposer provide significant and meaningful assistance to an SBE or MWBE in getting required bonding or insurance coverage for the Contract at issue or provide alternatives to bonding or insurance for SBEs and MWBEs? To document satisfaction of this GFE, the Proposer must submit: (a) the name of the SBE or MWBE; (b) a description of the assistance the Proposer provided; (c) the date the Proposer provided the assistance; (d) the name of a contact person with the SBE or MWBE who can verify that the Proposer provided the assistance; and (e) any additional information requested by the City. No credit will be given for assistance provided to an Affiliate of the Proposer.
- 5.7 Negotiating in good faith with MWBEs and SBEs.** Did the Proposer document having engaged in at least some back and forth negotiation between the Proposer and SBEs or MWBEs?
- 5.8 Financial Assistance.** Did the Proposer provide significant and meaningful assistance to an SBE or MWBE of the following nature in connection with the Contract: (a) assistance in obtaining equipment, a loan, capital, lines of credit, (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Proposer’s suppliers as the Proposer. To receive credit for this GFE, Proposers must document: (a) the name of the SBE or MWBE; (b) the description of the assistance the Proposer provided; (c) the date the Proposer provided the assistance; and (d) the name of a contact person with the SBE or MWBE who can verify that the Proposer provided the assistance. No credit will be given for assistance provided to an Affiliate of the Proposer.
- 5.9 Entering Into Joint Ventures.** To receive credit for this GFE, the Proposer must demonstrate that it negotiated a Joint Venture or partnership arrangement with one or more MWBEs or SBEs, as applicable, on the Contract. To receive credit for this GFE, Proposers must document: (a) the name of the SBE; (b) a description of the Joint Venture or partnership; (c) evidence of the date the SBE and/or MWBE entered into the agreement; and (d) the name of a contact person with the SBE and/or MWBE who can verify the terms of the agreement. No credit will be given for a joint venture with an Affiliate of the Proposer
- 5.10 Quick Pay Commitment on Contracts Up For Award.** To receive credit for this GFE, Bidders must provide the City with: (i) a copy of the Bidder’s Quick Pay Commitment related to the specific project; (ii) documentation indicating that all MWSBEs notified under GFE 5.3.1 Contacts have received a written copy of the Bidder’s Quick Pay Commitment prior to the Bid opening (see Quick Pay Commitment definition in CBI Policy, Part A, Appendix). Bidders will not receive credit for this GFE if: (i) the Quick Pay Commitment has a statement indicating that the Bidder *will consider* entering into a Quick Pay Commitment; or (ii) the Bidder only verbally communicated the Quick Pay Commitment to the Subcontractor. **A Bidder may receive credit for this GFE only if it receives credit for GFE 5.1 (Contacts).**

In addition to the above, the City may also take into account: (1) the Proposer's past performance in meeting MWBE and SBE goals; and (2) the performance of other Proposers in meeting the established Subcontracting goals on the Contract up for award. For example, when a Proposer fails to meet a Subcontracting Goal, but other Proposers meet it, the City may reasonably raise the question of whether, with additional reasonable efforts the Proposer in question could have met the goal.

## **Section 6: Waivers**

- 6.1** Failure to comply with Part C of the CBI Program may be waived only in accordance with this Section. Notwithstanding anything contained herein to the contrary, the waivers referenced in this Section may be granted by the Program Manager or the Program Manager's designee, by the City Manager or the City Manager's designee, or by City Council.
- 6.2** The Program Manager, or any of the other parties listed in Section 6.1, shall have the power and authority to waive non-compliance with the CBI Program with respect to a Service Contract upon determining in his or her reasonable discretion that such waiver would not put Proposers that complied with the CBI Program at a competitive disadvantage. All such waivers must be in writing, signed by the City, in order to be valid.
- 6.3** The waivers referenced in Section 6 may be granted without notice to City Council. Nothing in Section 6 shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

## **Section 7: Extensions**

The Program Manager may grant a written extension of any deadline set forth in this Section. No extension shall be valid unless documented in writing by the City.

## **Section 8: False Statements or Certifications**

It shall be a violation of the CBI Program, and grounds for rejection of a Proposal and other sanctions for any Proposer to make a false or materially misleading statement, or certification regarding any matter relevant to the CBI Program.

## **Section 9: Expectations for MWSBEs**

MWSBEs are responsible for promoting themselves and taking the initiative to obtain work on City Contracts. Specifically, MWSBEs shall:

- Monitor the City's website for posting of contracting opportunities;
- Make every effort to establish contacts and relationships with prospective Bidders for potential future business, including attending pre-bid conferences;
- Respond promptly to solicitation requests; and
- Attend seminars, classes and workshops designed to facilitate networking and/or enhance business skills.

## Part D CBI Program

### Post Contract Award Requirements

#### Section 1: Scope

- 1.1. This document governs compliance with the CBI Program after Contract award. **It applies to and is incorporated into all City Contracts** for which a Subcontracting Goal has been established or negotiated (which includes all Construction Contracts over \$300,000, and all Service Contracts over \$100,000, unless otherwise exempt). Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part D.
- 1.2. **The following Sections of Part D also apply to: (a) Informal Contracts, and (b) Formal Service Contracts, Construction Contracts, and Commodities Contracts entered into without a competitive process or for which the City did not set an SBE or MWBE Goal and did not obtain a Committed SBE or MWBE Goal from the Contractor:**

Section 6: New Subcontractor Opportunities

Section 9: Utilization Reports

Section 10: Compliance Documentation

Section 11: False Statements or Misrepresentations

Section 12: Special Provision for Exempt Contracts and Informal Contracts

Section 13: Violations and Investigations

Section 14: Remedies

Section 15: Contract Provisions

Section 16: Compliance and Remedies

#### Section 2: Committed Subcontracting Goals Apply Through Contract Completion

- 2.1. **Contractors shall have an affirmative, ongoing obligation to meet or exceed the Committed Subcontracting Goals for the duration of the Contract.** Unless exempted by another Section of this Part D, the City may deem a Contractor to be in violation of the CBI Program and in breach of its Contract if at any time the City determines that: (a) the Contractor will not meet a Committed Subcontracting Goal; and (b) the reasons for the Contractor's failure are in the City's judgment within the Contractor's control. For example, if a Contractor does not meet the Committed SBE Goal because the Contractor terminated an SBE without cause or if the Contractor caused an SBE to withdraw from the project without justification, then the City could find the Contractor to be in violation.
- 2.2. **Exceptions.** A Contractor shall not be deemed in violation of this Program for failure to meet the Committed Subcontracting Goal to the extent such failure is directly attributable to:
- 2.2.1. **The City reducing the scope of a Contract** so as to eliminate or reduce work that was going to be performed by SBEs or MWBEs (whether through a change order, Contract amendment, force account or otherwise);
- 2.2.2. **An SBE's or MWBE's voluntary withdrawal** from the project if the Contractor demonstrates that such withdrawal was beyond the Contractor's reasonable control, so long as the Contractor complied with the Modified Good Faith Efforts to replace the SBE with another SBE or the MWBE with another MWBE; or
- 2.2.3. **Termination or reduction in the work of an SBE or MWBE**, if the Contractor demonstrates that such termination was consistent with the terms of this Program, and that the Contractor complied with the Modified Good Faith Efforts to replace the SBE with another SBE or the MWBE with another MWBE.

### Section 3: Performance of a Commercially Useful Function and Affiliate Status

- 3.1. Contractors have an ongoing, affirmative obligation to ensure that SBEs and MWBEs performing on the Contract are performing a Commercially Useful Function.** A Contractor shall be in violation of the CBI Program and in breach of its Contract if it lists an SBE or MWBE to receive credit toward a Committed Subcontracting Goal with knowledge that the SBE or MWBE will be acting as a Conduit or will otherwise not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which the Contractor will be seeking credit.
- 3.2. For purposes of meeting the Committed Subcontracting Goals, Contractors shall only receive credit for the amount of SBE and/or MWBE participation that constitutes a Commercially Useful Function.** Payments exceeding the value of the Commercially Useful Function performed by an SBE or MWBE shall not count toward meeting the Committed Subcontracting Goal.
- 3.3. If an SBE or MWBE is found to be an Affiliate of the Contractor** prior to starting work on the Contract, the Contractor will not earn credit toward the SBE or MWBE Goal for amounts paid to that SBE or MWBE. If the City determines that an SBE or MWBE is an Affiliate of the Contractor after the SBE or MWBE starts work on the Contract, or if the SBE or MWBE is decertified for being an Affiliate after starting work on the Contract, the City may deny SBE or MWBE credit for amounts paid to the Affiliate and find the Contractor and the SBE and MWBE to be in violation of the CBI Program if the City determines in its sole discretion that the Contractor knew or should have known there was a significant risk that the City would consider the SBE or MWBE an Affiliate. Contractors shall be deemed to have knowledge of all CBI Program provisions, including those relating to Affiliates.

### Section 4: Change in SBE or MWBE Status

- 4.1** Changes in an SBE's or MWBE's certification status after submission of the Contractor's Bid or Proposal shall be handled as follows:
- 4.1.1. If an SBE's or MBE's certification terminates due to expiration or graduation,** the dollars paid to the SBE and/or MWBE on the Contract shall still count toward the Committed Subcontracting Goals.
- 4.1.2. If an SBE's or MWBE's certification terminates because the City determines that the SBE or MWBE is an Affiliate, or if an SBE or MWBE is found to be an Affiliate of the Contractor (even if not decertified),** then Section 3.3 shall determine whether there is a Program violation and whether the Contractor receives credit toward the SBE or MWBE Goal for amounts paid to the Affiliate.
- 4.1.3. If an SBE's or MWBE's certification terminates due to the SBE having done any of the following,** then the dollars paid to the SBE and/or MWBE on the Contract shall NOT count toward the Committed Subcontracting Goals and the Contractor shall be deemed in violation of the CBI Program and in breach of the Contract if it had knowledge of such conduct:
- The SBE or MWBE has obtained certification by false or fraudulent means;
  - The SBE or MWBE acts as a Conduit on any City Contract with the Contractor; or
  - The SBE or MWBE fails to perform a Commercially Useful Function reasonably commensurate to the compensation the Contractor agreed to pay such SBE or MWBE.
- Notwithstanding the above, if an SBE's or MWBE's certification terminates due to the SBE or MWBE obtaining it by false or fraudulent means, then the Contractor shall be able to count toward the Committed Subcontracting Goals all amounts paid to the SBE and/or MWBE prior to the date the Contractor became aware of such deception (and such time thereafter as is in the City's judgment reasonably necessary for the Contractor to replace the SBE or MWBE).

## **Section 5: Terminating or Replacing an SBE or MWBE**

- 5.1. Contractors shall not terminate, replace or reduce the work of an SBE or MWBE that the Contractor has counted toward meeting a Committed Subcontracting Goal unless:**
- 5.1.1.** The SBE or MWBE refuses to enter into a contract consistent with the SBE's or MWBE's Letter of Intent;
  - 5.1.2.** The SBE's or MWBE certification terminates for any of the reasons set forth in Section 4.1.2 or 4.1.3;
  - 5.1.3.** The SBE or MWBE materially breaches its contract with the Contractor;
  - 5.1.4.** The City reduces the Contract scope of work so as to eliminate or reduce the work that the SBE or MWBE was to perform; or
  - 5.1.5.** The SBE or MWBE voluntarily withdraws from the Contract for reasons not within the Contractor's reasonable control.
- 5.2. Contractors shall provide the Department and the CBI Program Manager written notice prior to replacing or terminating an SBE or MWBE on a Contract.** The notice shall identify the SBE or MWBE and the Contract, state the reason for the termination or replacement and state the proposed date on which such termination or replacement will occur. Unless the circumstances necessitate immediate termination or replacement, the Contractor shall provide such notice to the City at least **5 Business Days** before the Contractor terminates the SBE or MWBE. The Contractor shall further provide written notice to the SBE or MWBE stating the reasons for the termination. Unless circumstances dictate otherwise, the Contractor shall provide such notice before termination is to occur.
- 5.3. Modified GFEs to Replace an SBE or MWBE on a Contract.** When an SBE or MWBE withdraws or is terminated from a Contract for any reason, the Contractor shall comply with the Modified Good Faith Efforts Requirements described below to replace the departing SBE with another SBE and the departing MWBE with another MWBE. Likewise, when new opportunities for subcontracting arise on a Contract and the City sets a Supplemental SBE or MWBE Goal, the Contractor shall comply with the Modified GFEs set forth below in an effort to meet the Supplemental SBE or MWBE Goal:
- 5.3.1. Modified Contacts.** The Contractor must solicit at least 3 SBEs and/or MWBEs (depending on whether the Supplemental Goal is for SBEs or MWBEs) unless the City agrees in writing to a lower number (the "Modified Contacts"). The Contractor shall comply with the Good Faith Efforts requirements set forth in Parts B and C of the Program for making and documenting such SBE and MWBE contacts (excluding the contact deadlines). Contractors shall be required to provide a Letter of Intent for each SBE and MWBE they add to a Contract subsequent to Contract award.
  - 5.3.2. Additional Efforts.** In addition to making the Modified SBE Contacts, the Contractor shall undertake at least 2 of the other Good Faith Efforts listed in Section 5 of Parts B and C, excluding attendance at the City's Pre-Bid Meeting.

## **Section 6: New Subcontractor Opportunities**

- 6.1. Notice of New Subcontracting Opportunities.** If a Contractor elects to subcontract any portion of a Contract that the Contractor did not previously identify to the City as a subcontracting opportunity, or if the scope of work on a Contract increases for any reason in a manner that creates a new SBE or MWBE subcontracting opportunity (whether through a change order, Contract amendment, inaccurate initial estimate by the Contractor or otherwise), the Contractor shall: (a) promptly notify the City of the new subcontracting opportunity and, (b) inform the City whether the Contractor, existing SBEs or MWBEs or other existing subcontractors can perform the new opportunity.
- 6.2. Subcontracting Goals for New/Additional Subcontracting Opportunities.** Upon receipt of a notice of new subcontracting opportunities under Section 6.1, the Program Manager shall either: (a) notify the Contractor that there will be no Supplemental SBE or MWBE Goal for the new work or (b) establish and notify the Contractor of a Supplemental SBE and/or MWBE Goal for the new work (assuming there are SBEs and MWBEs listed in the City's database for that particular type of work, and in the event of MWBEs, assuming there are legal grounds for doing so).

- 6.3. Modified Good Faith Efforts.** If the City sets a Supplemental SBE and/or MWBE Goal for new work on a Contract, the Contractor shall comply with the Modified Good Faith Efforts set forth in Section 5.3 in attempting to meet each such Supplemental SBE and MWBE Goal.

## **Section 7: Special Provisions for Renewal of Contracts**

- 7.1.** In the event the City renews a Contract without a competitive process, the City shall establish Supplemental Subcontracting Goals that are the same as the Committed Subcontracting Goals for the Contract, unless there is just cause to change it. When a Supplemental Subcontracting Goal is set, the Contractor shall use Modified Good Faith Efforts to meet it.
- 7.2.** The Supplemental Subcontracting Goals and Modified Good Faith Efforts and Good Faith Negotiation requirements shall be deemed incorporated into each Contract renewal document. The Contractor entering into the renewal shall be required to either meet each Supplemental Subcontracting Goal established or document that it has satisfied the Modified Good Faith Efforts and Good Faith Negotiation requirements referenced herein. Failure to do so shall: (a) subject the Contractor to any of the remedies set forth in this Part D; and / or (b) result in the City soliciting new Bids or Proposals for the Contract rather than renewing with the existing Contractor.

## **Section 8: Payment to SBEs and MWBEs.**

- 8.1. Payment to SBEs and MWBEs.** Contractors shall abide by N.C. General Statute 143-134.1 (b), which states: Within seven days of receipt by the prime contractor of each periodic or final payment, the prime contractor shall pay the subcontractor based on work completed or service provided under the subcontract. If any periodic or final payment to the subcontractor is delayed by more than seven days after receipt of the periodic or final payment by the prime contractor, the prime contractor shall pay the subcontractor interest, beginning on the eighth day, at the rate of one percent (1%) per month or fraction thereof on such unpaid balance as may be due.
- 8.2. Quick Pay Commitment.** If a Contractor has made a Quick Pay Commitment under Parts B or C of this Program, the Contractor shall comply with any provisions of the Quick Pay Commitment that are more stringent than Section 143-134.1 (b), but shall also remain bound by Section 143-134.1(b). For instance, if a prime contractor entered into a Quick Pay Commitment to pay its subcontractors within 20 days after work is completed, but yet has still not paid its subcontractors two months after the prime contractor has been paid by the City, the prime contractor will be in violation of Sections 8.1 and 8.2 of this Part and subject to any remedies the City may impose as a result, and will also be liable under state law for violating Section 143-134.1 (b) and for paying any interest that may be due as a result.

## **Section 9: Utilization Reports and Documentation of Payments**

For all Contracts of \$10,000 or more, Contractors (i) shall report to the City the total dollars paid to each SBE, MBE, WBE, and all other subcontractors and suppliers on each Contract, and (ii) shall provide such payment affidavits, certifications, or other documentation regarding payment to subcontractors and suppliers as may be requested by the City from time to time. If the Contract will be performed within six (6) months or less, then the payment affidavit may be submitted with the final deliverable. If the Contract will not be performed within six (6) months, then the payment affidavit shall be submitted at such times as required by the City. The absence of an established Subcontracting Goal on a Contract shall not relieve the Contractor of the Contractor's obligation to submit payment affidavits.

Such affidavits, certifications or documents shall be in the format specified by the Charlotte Business Inclusion Office, and shall be submitted at such times as required by the City. Failure to provide such reports within the time period specified by the City shall entitle the City to exercise any of the remedies set forth in Part D, Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

## **Section 10: Compliance Documentation**

- 10.1. Responding To City Requests for Information.** The City may request information, documents or other materials from a Contractor at any time for the purpose of determining whether the Contractor is in compliance with the CBI Program. The Contractor shall comply with all such requests within **3 Business Days**, unless otherwise agreed by the City in writing.
- 10.2. Contractor Compliance with City Consultant Requests for Information.** Contractors shall further cooperate with the City and any consultants hired by the City: (a) in any investigation initiated by the City to determine whether the Contractor is in compliance with the CBI Program, or (b) in connection with any disparity study conducted by the City to determine whether there is discrimination among contractors or subcontractors on City contracts.
- 10.3.** Failure to comply with this Section 10 by a Contractor shall entitle the City to exercise any of the remedies set forth in Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

## **Section 11: False Statements or Misrepresentations.**

Contractors shall not make any false statements, material misrepresentations or material, misleading omissions regarding any matter relevant to the CBI Program (including but not limited to information relating to Good Faith Efforts, SBE or MWBE utilization, SBE or MWBE certification or payments to SBEs or MWBEs). Failure to comply with this Section shall entitle the City to exercise any of the remedies set forth in Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

## **Section 12: Special Provision for Exempt Contracts.**

If requested by the Program Manager, Business Enterprises that enter into Exempt Contracts shall be required to notify the City of any subcontracting opportunities that may arise on the Exempt Contract for which there are SBEs or MWBEs listed in the City's database. Failure to comply with this provision shall be deemed a material breach of the Exempt Contract, and shall entitle the City to exercise any of the remedies set forth in Section 14.

## **Section 13: Violations and Investigations**

- 13.1. Reporting of Violations and Unfair Practices.** Contractors, SBEs and MWBEs shall report any alleged CBI Program violations or unfair practices involving the CBI Program to the CBI Program Manager within **5 Business Days** after first becoming aware of the act or omission in question. The Program Manager may reject as untimely any report submitted after such time. The CBI Program office shall not accept reports of violations or unfair practices that are submitted more than **30 Calendar Days** after the complaining party first became aware of the act or omission in question.
- 13.2. Investigations and Burden of Proof.** The MWSBE Office is empowered to receive and investigate complaints and allegations regarding compliance with the CBI Program and the rules and guidelines promulgated thereunder, and to initiate its own investigations. If the MWSBE Office determines in its sole discretion that an investigation is warranted, the Program Manager shall notify the party being investigated. Upon written notice of such investigation, the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing duty to provide complete, truthful information to the Program Manager. The party under investigation shall have the burden of proof in showing that it complied with the Program.



## Section 14: Remedies

**14.1.** A violation of the CBI Program by a Contractor shall constitute a material breach of the Contract, and shall entitle the City to:

- 14.1.1.** Exercise all rights and remedies that it may have at law or at equity for violation of the Contract;
- 14.1.2.** Terminate the Contract for default;
- 14.1.3.** Suspend the Contract for default;
- 14.1.4.** Withhold all payments due to the Contractor under the Contract until such violation has been fully cured or the City and the Contractor have reached a mutually agreeable resolution;
- 14.1.5.** Assess liquidated damages as provided in Section 14.2; and/or.
- 14.1.6.** Offset any liquidated damages and/or any amounts necessary to cure any violation of the CBI Program from any retainage being held by the City on the Contract, or from any other amounts due to the Contractor under the Contract.

The remedies set forth herein shall be deemed cumulative and not exclusive, and may be exercised successively or concurrently, in addition to any other available remedy.

**14.2. Liquidated Damages.** In entering into a Contract that is subject to the CBI Program, the Contractor agrees to the following:

The City and the Contractor acknowledge and agree that the City will incur damages if the Contractor violates the CBI Program in one or more of the ways set forth below, including but not limited to loss of goodwill, detrimental impact on economic development and diversion of internal staff resources. The parties further acknowledge and agree that the damages the City might reasonably be anticipated to accrue as a result of such failures are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Contractor agrees to pay the liquidated damages assessed by the City at the rates set forth below for each specified violation of the CBI Program. The Contractor further agrees that for each specified violation the agreed upon liquidated damages are reasonably proximate to the loss the City will incur as a result of such violation:

- 14.2.1. Failure to Meet Committed Subcontracting Goal.** If the City determines upon completion or termination of a Contract that the Contractor did not meet a Committed Subcontracting Goal and that such failure is not otherwise excused under Part D, the City may assess the lesser of: (a) \$200,000 or (b) the dollar difference between the Committed SBE, MBE or WBE Goal that was missed and the Contractor's actual SBE, MBE or WBE utilization toward that Goal. Such amount may be assessed when it becomes apparent that it will not be possible for the Contractor to achieve the Committed Subcontracting Goal. However, liquidated damages under this Section 14.2.1 may be assessed only once.
- 14.2.2. Use of a Conduit.** If the Contractor lists an SBE or MWBE to receive credit toward a Committed Subcontracting Goal with knowledge that the SBE or MWBE will be acting as a Conduit or will not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which the Contractor will be seeking credit, the City may assess the lesser of: (a) \$100,000 per incident; or (b) the dollar amount the Contractor indicated that it would pay such SBE or MWBE in the SBE's or MWBE's contract (or if no contract has been signed, the SBE's or MWBE's Letter of Intent).
- 14.2.3. Wrongful Termination or Replacement of SBE or MWBE.** If the Contractor terminates or replaces an SBE or MWBE in violation of the CBI Program, the City may assess the lesser of: (a) \$50,000 per incident; or (b) the dollar amount of the work remaining to be performed by the terminated SBE or MWBE at the time it was terminated (or if the SBE or MWBE was not terminated because it was never retained, then, the dollar amount that the Contractor indicated it would pay the SBE or MWBE in the SBE's or MWBE's Letter of Intent).

- 14.2.4. Failure to Comply with CBI Program Following Termination or Withdrawal by an SBE or MWBE.** If the Contractor fails to comply with the Modified Good Faith Efforts requirements in replacing an SBE or MWBE that is terminated or withdraws from work on a Contract, the City may assess the lesser of: (a) \$50,000 per incident; or (b) the dollar amount of the work remaining to be performed by the SBE or MWBE that withdrew or was terminated at the time of the termination or withdrawal.
- 14.2.5. Failure to Comply with CBI Program to Add New Subcontractors.** If the Contractor fails to comply with Modified Good Faith Efforts when required in adding new subcontractors to a Contract, or when the scope of work of a Contract changes so as to create a new SBE or MWBE subcontracting opportunity, or on a Contract renewal, the City may assess the lesser of: (a) \$50,000 per incident; or (b) the dollar amount of the new or additional work or renewal.
- 14.2.6. False Statements and Misrepresentations.** If the Contractor makes a false statement, material misrepresentation or material misleading omission regarding any matter relevant to the CBI Program (including but not limited to information relating to good faith efforts, SBE or MWBE utilization, SBE or MWBE certification or payments to SBEs or MWBEs), the City may assess the lesser of: (a) \$50,000 per incident; or (b) if the misrepresentation relates to payment, the dollar difference between what the Contractor represented and the truth. In the event of any overlap between this Section and 14.2.2, the damages set forth in 14.2.2 shall apply.
- 14.2.7. Failure to Respond to Request for Information.** If the Contractor fails to provide any report, documentation, affidavit, certification or written submission required under the CBI Program within the time period set forth therein, the City may assess \$40 per day for each day that such report, documentation or written submission is overdue.
- 14.2.8. Seeking Credit for Use of An Affiliate to Meet the Committed Subcontracting Goal.** If the City finds a violation of Section 3.3 of this Part due to a Contractor seeking credit for utilizing an SBE or MWBE that the City determines to be an Affiliate, the City may assess the lesser of: (a) \$75,000 per incident or (b) the dollar amount the Contractor counted towards its Committed Subcontracting Goal for that SBE or MWBE. In the event of any overlap between this Section and 14.2.2, the damages set forth in 14.2.2 shall apply.
- 14.2.9. Quick Pay Commitment.** If the Bidder/Proposer on a contract offers a Quick Pay Commitment to any MWSBE Subcontractor at bid and rescinds the Quick Pay Commitment after being awarded the Contract, then the City may assess the lesser of: (a) \$50,000 or (b) ten percent (10%) of the dollar amount the Contractor indicated that it would pay such SBE and/or MWBE at the time of the Contract's award.

The City may agree to modify or eliminate the liquidated damages amounts set forth above for specific Contracts, provided that no such modification or elimination shall be effective unless it is signed in writing by the City as part of the Contract and specifically references Part D of this Program.

- 14.3. Remedies for Violations in the Procurement Process.** A violation of the CBI Program in the bid phase of a Contract shall be grounds for rejection of the applicable Bid or Proposal. If the violation involves bad faith or dishonesty or may otherwise be indicative of the violator's qualification to perform future Contracts, the City may consider such violation in awarding future Contracts.
- 14.4. Flow Down.** The City shall be entitled to exercise all remedies and recover all damages set forth in this Section 14 directly from each Contractor that it enters into a Contract with, regardless of whether such remedies or damages are due to a breach by that Contractor or by a subcontractor or supplier on the applicable project. Each Contractor on a City Contract shall be responsible for taking appropriate measures to enable it to exercise all remedies and recover all damages set forth in this Section 14 directly from each subcontractor and supplier providing services or goods on the applicable project. Additionally, the City shall be a third party beneficiary to each Contract for the purpose of seeking injunctive relief and other remedies to the extent necessary to enforce this Participation Plan directly against Contractors (in lieu of relying on the Design Build Team to do so), though the City shall have no obligation to do so

The City shall be entitled to exercise all remedies and recover all damages set forth in this Section 14 directly from any party that it enters into a Participation Plan under Part G, regardless of whether such remedies or damages are due to a breach by that party or by a contractor or subcontractor on the applicable project. Each party that enters into a Participation Plan with the City shall be responsible for taking appropriate measures to enable it to exercise all remedies and recover all damages set forth in this Section 14 directly from each contractor and subcontractor working on the project. Additionally, the City shall be a third party beneficiary to each Contract for the purpose of seeking injunctive relief and other remedies to the extent necessary to enforce this Participation Plan directly against Contractors, though the City shall have no obligation to do so

## **Section 15: Contract Provisions**

**15.1. Mandatory Contract Provisions.** Each Contract subject to this Part D shall include the provisions set forth below, subject to such minor revisions as may be necessary to achieve consistent terminology:

**CBI Program.** The City has adopted a CBI Program, which is posted on the City's website and available in hard copy form upon request to the City. The parties agree that:

- (a) The terms of the City's CBI Program, as revised from time to time, together with all rules and guidelines established under such program (collectively, the "CBI Program") are incorporated into this Agreement by reference; and
- (b) A violation of the CBI Program shall constitute a material breach of this Agreement, and shall entitle the City to exercise any of the remedies set forth in Part D of the CBI Program, including but not limited to liquidated damages; and
- (c) Without limiting any of the other remedies the City has under the CBI Program, the City shall be entitled to withhold periodic payments and final payment due to the Contractor under this Agreement until the City has received in a form satisfactory to the City all claim releases, payment affidavits and other documentation required by the City's CBI Program, and in the event payments are withheld under this provision, the Contractor waives any right to interest that might otherwise be warranted on such withheld amount under G.S. 143-134.1; and
- (d) The remedies set forth in Part D of the CBI Program shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy; and.
- (e) The City will incur costs if the Contractor violates the CBI Program, and such costs are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Contractor agrees to pay the City liquidated damages at the rates set forth in Part D of the CBI Program.
- (f) The Contractor agrees to participate in any dispute resolution process specified by the City from time to time for the resolution of disputes arising from the CBI Program.
- (g) Nothing in this Section shall be construed to relieve a Contractor from any obligation it may have under N.C. Gen. Stat. 143-134.1 regarding the payment of subcontractors.

If the City agrees to modify or eliminate liquidated damages for a specific contract, then the specific modification or waiver agreed to must be set forth in subpart (e) above, and must specifically reference Part D of the CBI Program.

**Payments Made Under a Contract.** Each Contract executed by the City shall contain the following provision regarding Payment Affidavits:

**Payment Affidavits.** As a condition to receiving payments under this Contract, the Contractor agrees to provide a written payment affidavit detailing the amounts paid by the Contractor to all subcontractors and suppliers receiving payment in connection with this Contract ("Payment Affidavit"). If the Contract will be performed within six (6) months or less, then the payment affidavit may be submitted with the final deliverable or invoice. If the Contract will be performed longer than six (6) months, then the payment affidavit shall be submitted at such times as required by the City. In order to properly file a Payment Affidavit, each Contractor and all subcontractors and suppliers under the Contract must be registered in the City's Vendor Registration System. Payment Affidavits shall be in the format specified by the City from time to time. Failure to provide such affidavits within the time period specified by the City shall entitle the City to exercise any of the remedies set forth in Part D, Section 14 of the Charlotte Business Inclusion Policy.

#### **Section 16: Compliance and Remedies.**

- 16.1.** The MWSBE Office shall review all Contracts for compliance with the CBI Program. This review shall include, but not be limited to, whether the Committed Subcontracting Goals (in both dollar amounts and percentages) are maintained over the duration of the Contract, whether the Contractor improperly terminated, replaced or reduced the work of an SBE or MWBE, whether the Contractor complied with Section 6 regarding any Contract amendments, renewals or additions to scope, whether SBEs on the Contract performed a Commercially Useful Function, etc. The MWSBE Office may conduct such review on its own, or may hire consultants to assist in such process.
- 16.2.** When the MWSBE Office determines that a Contractor has violated the CBI Program, the Program Manager shall make a recommendation to the Department Director regarding appropriate remedies for the City to exercise in that situation and the Department Director responsible for the affected procurement process or Contract shall make the decision as to what remedies will be exercised.

## **Part E CBI Program**

### **SBE and MWBE Certification and Eligibility**

#### **Section 1: Program Overview and Scope**

This document states requirements for becoming and remaining certified as a Small Business Enterprise, Minority Business Enterprise or Women Business Enterprise under the City of Charlotte's CBI Program. Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part E.

#### **Section 2: SBE Certification and Eligibility**

A Business Enterprise shall be eligible for Certification as an SBE only if it meets each of the following requirements:

- 2.1. Licensed and For Profit.** Only for profit enterprises shall be eligible for SBE Certification. Non-profit organizations cannot become certified as SBEs. Additionally, to be eligible for SBE Certification, a Business Enterprise must: (a) be authorized to do business in the State of North Carolina; (b) unless exempt, have a valid Mecklenburg County privilege license; and (c) demonstrate that the Business Enterprise, its employees or Eligible Owners holds each business or professional license required for the operation of each type of business for which the Business Enterprise seeks SBE Certification.
- 2.2. Ownership.** "Eligible Owners" must own at least fifty-one percent (51%) of the legal and equitable interest in the Business Enterprise. A person shall be deemed an "Eligible Owner" if such person:
  - 2.2.1.** Owns in his or her own name a legal and equitable interest in the Business Enterprise;
  - 2.2.2.** Acquired the interest in a real and substantial arms-length transaction utilizing real and substantial consideration;
  - 2.2.3.** Acquired the interest with his or her own financial or equivalent resources or has put his or her own financial resources at risk in the operation of the Business Enterprise;
  - 2.2.4.** Has a personal net worth under \$750,000, excluding: (i) \$500,000 of the equity in his or her primary residence\*; and (ii) his or her ownership interest in the applicant Business Enterprise; and (iii) the value of his or her retirement savings account as defined by the United States Tax Code and the Internal Revenue Service;
  - 2.2.5.** Is not currently an official, officer or employee of the City; and
  - 2.2.6.** Is either a U.S. citizen, or permanent resident, or has a valid work visa from the U.S. government appropriate for the type of work that the Business Enterprise performs.

\*For a married couple, the \$500,000 limit applies to the total equity in the residence.

In the case of a transfer in ownership, the owner to which the business has been transferred must be the Eligible Owner for a minimum of one year subsequent to the date of transfer, and must meet requirements described herein.

- 2.3. Management and Control.** The daily business operations of the Business Enterprise shall be managed and controlled by one or more Eligible Owners. Such Eligible Owner(s) shall be deemed to manage and control the daily business operations only if:
  - 2.3.1.** Their management and control is specifically demonstrated to be real, substantial and continuing and goes beyond the pro-forma ownership of the Business Enterprise as reflected in its ownership documents;
  - 2.3.2.** They possess the power to and actually direct the management and policies of the Business Enterprise;
  - 2.3.3.** They make both routine and major decisions on matters of management, policy and operations; and
  - 2.3.4.** They are not subject to formal or informal restrictions that are inconsistent with the customary discretion of majority owners.

- 2.4. Experience and Involvement of Eligible Owners.** One or more Eligible Owners must:
- 2.4.1.** Have substantial experience in the trade or industry or other experience, which would be necessary to make routine and major decisions for the Business Enterprise; and
  - 2.4.2.** Regularly hold themselves out to the public and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.
- 2.5. Actively in business.** The Business Enterprise may not be certified until after all of the following has been demonstrated by the applicant:
- 2.5.1.** Formation of the Business Enterprise;
  - 2.5.2.** Commencement of sustained business activity in each trade or profession described on the Certification application; and
  - 2.5.3.** Commencement of ownership, management and control of daily business operations by the Eligible Owners(s).
- 2.6. Reserved.**
- 2.7. SBE Certification Based on NIGP Codes.** SBE Certification areas shall correspond to the major groups set forth in the National Institute of Government Purchasing (NIGP) Commodity Codes or such other classification codes or standards as the Program Manager may designate from time to time. SBEs shall be certified only for the NIGP Codes for which they apply and in which they have had sustained documented business activity for a minimum of twelve (12) months. As part of the SBE Certification and renewal process, each SBE shall identify the NIGP Code that best describes where the SBE derives the majority of its income (the SBEs "Primary Business").
- 2.7.1. Adding or altering NIGP Codes for which SBE status was initially granted.** If at any time subsequent to Certification an SBE can demonstrate sustained business activity in one or more additional areas, or if the SBEs Primary Business changes, the SBE can request that the City review, add or alter the NIGP codes upon which its initial Certification was based or change its listing for Primary Business. Adding or altering NIGP Codes or changing an SBEs Primary Business shall be subject to approval by the CBI Program Manager or designee.
  - 2.7.2. Performing services outside of the NIGP Codes for which SBE status was initially granted.** If an SBE responds to a solicitation to subcontract services in areas for which it was not initially or subsequently certified, the Contractor shall be able to count the utilization toward the SBE Utilization Goal as long as the SBE can demonstrate to the City's reasonable satisfaction that it will actually be performing the work in question.
- 2.8. Perform a Commercially Useful Function.** The Business Enterprise must perform a Commercially Useful Function. A Business Enterprise does not perform a Commercially Useful Function if it merely acts as a Conduit by passing the scope of work for which it is scheduled to perform or supply on the contract to an SBE or non-SBE firm.
- 2.9. Geographic Restriction and Significant Business Presence.**
- 2.9.1.** The Business Enterprise must have a Significant Business Presence in the Charlotte CSA.

- 2.9.2. Duration.** The Business Enterprise must satisfy the Significant Business Presence requirement throughout the period the Business Enterprise is certified as an SBE or registered with the City as an MWBE. If after a Business Enterprise becomes certified as an SBE, or registered as an MWBE, and the Charlotte CSA changes so as to exclude the area where the SBE's, or MWBE's qualifying place of business is located, the SBE and/or MWBE shall be entitled to retain its Certification and registration until the date on which its certification either with the City or the HUB Office expires in accordance with this Program.
- 2.9.3. Factors.** The City will consider the following factors including but are not limited to:
- Business Enterprise is headquartered in the Charlotte CSA;
  - Number of full-time employees;
  - Location of managerial or decision-making personnel;
  - Lease agreement;
  - Post office box, mail drop, or message center;
  - Previous work or contracts performed in the Charlotte CSA;
  - Percentage of income or revenue derived from Charlotte CSA;
- 2.9.4. Totality of the Circumstances Test.** The City will apply a totality of the circumstances test in deciding whether a Business Enterprise has a Significant Business Presence. No single factor is essential to such a finding. However, a location utilized solely as a post office box, mail drop or message center, or any combination thereof, will not be considered a Significant Business Presence.
- 2.10. Threshold Size and Graduation Standards.** The annual sales receipts and the number of employees of the Business Enterprise, combined with all Affiliates, cannot exceed the size standards set forth below.
- 2.10.1. SBE Size Eligibility.** No applicant Business Enterprise shall be certified as an SBE, and following Certification of an SBE, no Certification shall be renewed if on the effective date of the application or renewal the applicant Business Enterprise or SBE (combined with all Affiliates) has achieved a size standard that exceeds twenty-five (25%) of the applicable size standards established by the Small Business Administration at 13 CFR § 121.201 *et. seq.* for the SBEs Primary Business, as amended, or successor regulation or classification system by either:
- (a) Annual receipts averaged over the three (3) preceding fiscal years;
  - (b) Size standard based on number of employees;
  - (c) Or other criteria, which the Program Manager may establish from time to time.
- 2.10.2. Certification Based on NAICS Size Standards ("SBA Size Regulations").** The annual receipts and number of employees of an applicant Business Enterprise shall be determined in accordance with the definitions and methodology established by the Small Business Administration at 13 CFR 121.201 *et. seq.* as amended, or successor regulation or classification system, all of which are incorporated into this Program by reference.
- 2.10.3. SBE Graduation from NAICS Size Standard.** If an SBE, together with its Affiliate(s) has exceeded the graduation criteria in the NAICS major group that matches the SBE's Primary Business, the SBE shall be deemed to be graduated from SBE Certification. In such event, the SBE and its Affiliate(s) shall no longer be considered eligible to remain certified as SBEs. Graduation, or other conditions of ineligibility of an SBE, shall not affect the contribution made by the SBE toward satisfaction of a SBE Utilization Goal if the work was bid or proposed to be performed by the SBE before the date of ineligibility or achievement of the graduation criterion, except as provided in Part D.
- 2.10.4. Graduation Criteria Applies to Affiliates.** The graduation criteria set forth above shall apply to all Affiliates of the graduating SBE as well as the SBE itself. When an SBE graduates from Certification, so do all Affiliates of the SBE. When an SBE has become ineligible for Certification, its Affiliates shall be ineligible for certification as well.

**2.11. Affiliate Relationships.** In determining whether an applicant Business Enterprise is within the size thresholds set forth in this Part, the City will consider the combined sales volume and employees of all “Affiliates” of the applicant. Two entities are “Affiliates” of one another when: (a) one controls or has the power to control the other, (b) a third party or group of parties controls or has the power to control both; or (c) there is a significant relationship between the two entities as described in Section 2.11.2.

**2.11.1. Control.** Examples of the power to control include but are not limited to:

- Ownership of a majority equity interest (stock, partnership shares, etc.),
- Voting control of the board of directors
- Officer with decision making authority
- Approval rights over key decisions (through charter, by-laws, shareholder’s agreement or otherwise)
- Power to prevent a quorum, or to otherwise block action by the board of directors or shareholders.

Control may be direct or indirect, and need not be actually exercised to create an Affiliate relationship.

**2.11.2. Significant Relationship.** There is a significant relationship between two entities when one entity is significantly dependent on the other, when one entity (through shared officers, employees, etc.) has the ability to play a key role in the management or direction of the other, or when the two entities have share facilities, assets or employees to a significant degree or have an identity of interest (through family relationships or otherwise). The factors the City will consider include but are not limited to:

- Common ownership, management or employees,
- Shared equipment, assets or facilities,
- Family relationships,
- Physical proximity,
- Percentage of revenue derived from the other entity,
- Loans, leases and contributions, and
- Contractual or other significant relationships

**2.11.3. Totality of the Circumstances Test.** The City will apply a totality of the circumstances test in deciding whether an Affiliate relationship exists. No single factor is essential to such a finding.

For instance, if two entities operate from the same property, are in the same general industry, share employees and equipment and have key management officials in common, the City will find an Affiliate relationship even if one entity derives only a small percentage of its income from the other. Likewise, if one entity receives 90% of its income from another entity, the City may find an Affiliate relationship even if none of the other factors are present.

**2.11.4. Presumption of Affiliate Status.** The City will presume that two or more entities are Affiliates of one another when both of the following conditions are met:

- 50% or more of one entity’s annual gross revenue over the prior 3 years derived from contracts with the other entity or group of entities, and
- The entities have common ownership, common management, shared facilities, shared assets, family relationships or other significant connections.

This presumption is rebuttable in the City’s discretion if the applicant business shows that the connection between the two entities is minimal, and that the applicant business is no longer at any risk of being financially dependent on the other business.

The above presumption does not in any way limit the City’s ability to find an Affiliate relationship when the two conditions set forth above are not met.



- 2.12. Registration as an MBE or WBE.** To participate in the CBI Program as an MWBE, a Business Enterprise must meet two requirements:

**2.12.1. Certification by the State of North Carolina.** The Business Enterprise must be certified by the State of North Carolina as a historically underutilized business within the meaning of N.C. Gen. Stat. 143-128.4. To get certified WBEs must be at least fifty-one percent (51%) owned by one or more persons who are female. MBEs must be at least fifty-one percent (51%) owned by one or more persons who are members of one of the groups set forth below:

<b>MWBE Category</b>	<b>Owned or Controlled by a Person or Persons</b>
<b>African American or Black</b>	Having origins in any of the black racial groups of Africa
<b>Hispanic</b>	Of Spanish or Portuguese culture having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race
<b>Asian</b>	Having origins in any of the original peoples of the Far East, Southeast Asia, Asia, Indian continent, or Pacific islands
<b>Native American or American Indian</b>	Having origins in any of the original Indian peoples of North America

**2.12.2. Significant Business Presence In Relevant Market.** To participate in the CBI Program as an MBE or WBE, the business enterprise must be: (i) certified by the State of North Carolina Historically Underutilized Business (HUB) Office as an MBE or WBE; and (ii) registered with the City of Charlotte and determined by the Program Manager to have a Significant Business Presence in the Charlotte CSA (which is the City's relevant market as defined by the 2011 Disparity Study). The Significant Business Presence determination will be made by the Program Manager as provided in Section 2.9, just as it is for SBEs. A state certified MWBE that meets the registration and Significant Business Presence requirements is deemed to be "Registered" as an MWBE for purposes of the CBI Program.

**2.12.3. Conflict of Interest.** The City will not register MWBEs that are owned or controlled by one or more City officials, officers, or employees.

- 2.13. Appeal Process.** If a Business Enterprise feels that it has been unfairly denied SBE or MWBE status or that its SBE or MWBE status has been wrongfully terminated by the City, the Business Enterprise shall submit its concerns in writing to the CBI Program Manager within **30 Days** after the aggrieved incident. If the Program Manager fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal by sending written notice to City Manager or a person designated by the City Manager to hear the appeal. Notices of appeal must be sent within **10 Days** after the aggrieved party receives notice of the decision being appealed from, and must identify the decision being appealed and each reason why the aggrieved party takes issue with the decision. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

- 2.14. Certification Procedures.** The Program Manager shall establish reasonable procedures and methods for the Certification of applicant Business Enterprises as SBEs and the Registration of applicant Business Enterprises as MWBEs, in order to effect the purposes of this CBI Program.

- 2.15. Interviews, Investigation and Onsite Visits.** The CBI Program office may interview all persons upon whom eligibility for Certification or Registration is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for Certification or Registration. A Business Enterprise wishing to become or remain Certified as an SBE or Registered as an MWBE shall cooperate with the CBI Program office in supplying additional information that may be requested in order to make a determination. If an SBE or MWBE fails to respond to the CBI Program office's request for information within (a) either the time period specified in the notice requesting information or (b) if no time is specified in the notice within 15 Days subsequent to the date of the notice, the City may immediately suspend eligibility and/or terminate SBE Certification or MWBE Registration.
- 2.16. Attendance at Orientation Meetings.** The City shall conduct periodic meetings to educate SBEs and MWBEs about CBI Program requirements and about general matters relating to participating in City contracts or contracting in general. The Program Manager may by rule or regulation require SBEs and MWBEs to attend follow-up meetings on a periodic basis, but no more than once every two years.
- 2.17. Continued Eligibility and Renewal of Certification.** An SBE Certification shall be valid for a 3-year period. An SBE may apply to renew its SBE Certification by submitting a renewal application no later than **30 days** before its third year anniversary of Certification. An SBE Certification shall terminate automatically and without notice upon the failure of the Business Enterprise to satisfy any requirement set forth in this Section.
- 2.18. Continued Eligibility and Renewal of MWBE Registration.** Unless otherwise revised by the City, an MWBE Registration shall be valid for as long as the MWBE is certified as such by the State of North Carolina.
- 2.19. Suspension, Revocation or Modification of SBE Certification.** The CBI Office shall have the power to suspend or revoke any SBE Certification or MWBE Registration issued under the CBI Program and may suspend an SBE's or MWBE's participation from counting toward an SBE or MWBE Goal if:
- 2.19.1.** The SBE or MWBE has by false or fraudulent representations obtained SBE Certification or MWBE Registration;
  - 2.19.2.** The CBI Office at any time determines that the SBE or MWBE is not eligible for Certification or Registration due to Affiliate status, exceeding the size thresholds or other reasons;
  - 2.19.3.** The SBE or MWBE is found to have committed any act which constitutes improper, fraudulent or dishonest dealing;
  - 2.19.4.** The SBE or MWBE acts as a Conduit or fails to perform a Commercially Useful Function on a City project;
  - 2.19.5.** The SBE or MWBE fails to comply with the provisions of the CBI Program, fails to submit information requested by the City, or fails to cooperate in investigations; or
  - 2.19.6.** The SBE or MWBE fails to actively participate in the CBI Program (such as by responding to solicitations) for an extended time without justification deemed adequate by the CBI Program Manager.
- 2.20.** The CBI Program may further modify the list of areas for which an SBE is certified or an MWBE is registered, if the SBE or MWBE regularly fails to submit bids or proposals for work in a particular area, or if it becomes apparent that the SBE or MWBE is not qualified to perform work in a particular area. However, nothing in this CBI Program or in any action or inaction by the MWSBE Office or the Program Manager shall be deemed a representation or certification that a particular SBE or MWBE is qualified to perform work in a particular area.
- 2.21.** The Program Manager shall make all decisions regarding the suspension or revocation of an SBE's Certification or MWBE's Registration, and the duration of such suspension or revocation. The CBI Program Manager may consider an SBE's or MWBE's history of performance on City projects when determining whether to suspend or revoke SBE Certification or MWBE Registration status.

## **Part F CBI Program**

### **Financial Partners**

#### **Section 1: Program Overview and Scope**

This document states requirements that Financial Partners must comply with under the City of Charlotte's CBI Program as a condition of receiving funding from the City of Charlotte. Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part F.

- 1. Financial Partners Defined.** Financial Partners are non-profit agencies or organizations with whom the City of Charlotte contracts to provide specific services. These agencies extend the City's capacity to address strategic priorities and concerns of the community. Partnerships include those due to special legislation, those that support City Council's five strategic focus areas; and partnerships that contribute to important community activities. The contract under which the City agrees to provide funding to a Financial Partner is called the "Financial Partner Agreement."
- 2. CBI Program Exemption.** If the Financial Partner currently administers an SBE, MWBE or DBE program, the Financial Partner may seek an exemption from the CBI Program by communicating to the Department administering the Financial Partner contract and the CBI Office, the Financial Partner's intention to use its existing contractor program in lieu of adhering to the CBI Program. Financial Partners exempted from the CBI Program shall, if requested in writing by the MWSBE Office, adhere to outreach and reporting requirements outlined in Sections 4 and 5 for SBE, MWBE and DBE firms.
- 3. CBI Establishes Annual SBE Utilization Goal.** The CBI Office shall set an SBE Goal for each Financial Partner, and the City shall take such steps as are appropriate to ensure accountability in meeting such goals by Financial Partners. The CBI Program Manager may, in his or her sole discretion, alter or adjust a Financial Partner's SBE Goal, as warranted. Where warranted by disparity data, the CBI Office may also set an MWBE Goal for a Financial Partner.
- 4. Outreach Requirements.** Financial Partners shall undertake the following outreach efforts with respect to SBEs and MWBEs:
  - 4.1. Notify SBEs and MWBEs of any contracting or procurement opportunities that may exist in the Financial Partner's business for which there are SBEs and MWBEs listed in the City's database; and
  - 4.2. Request advice and assistance from the CBI Office as to what additional SBE measures might be helpful if and when it becomes apparent that outreach alone will be insufficient to meet the Financial Partner's SBE and MWBE Goal; and
  - 4.3. Follow such additional measures as the CBI Office reasonably recommends.
- 5. Reporting Requirements.** Financial Partners shall report to the City on a periodic basis (either quarterly or according to the schedule established by the CBI Office) the total amount of dollars paid by the Financial Partner to SBEs and MWBEs. Periodic reporting shall occur no less than once a year. Reports shall be in such format and shall contain such information as may be specified by the CBI Office from time to time.
- 6. Material breach of contract.** Failure to comply with Part F of the CBI Program shall be deemed a material breach of the Financial Partner's Agreement with the City. In the event a Financial Partner fails to comply with Part F, the City shall be entitled to terminate or suspend the Financial Partner Agreement, withhold payment under the Financial Partner Agreement, impose any liquidated damages that may be included in the Financial Partner Agreement or impose any other remedy allowed under the Financial Partner Agreement, or at law or in equity, for material breach of contract. Notwithstanding the forgoing, failure to meet an SBE and/or MWBE Goal shall not be deemed a material breach if the Financial Partner complies with Section 4 and demonstrates to the City's reasonable satisfaction that it used diligent efforts to meet the SBE and/or MWBE Goal.

## **Part G CBI Program**

### **Alternative Construction Agreements**

#### **Section 1: Program Overview and Scope.**

This document sets requirements under the City of Charlotte's CBI Program for Construction Manager at Risk Agreements, Design-Build Agreements, Infrastructure Reimbursement Agreements and Public-Private Development Agreements. Unless otherwise provided, capitalized terms are defined in Appendix 1 to Part A of the Program and Section references refer to this Part G.

#### **Section 2: Definitions:**

- 2.1 Alternative Construction Agreement** means a Construction Manager (CM) at Risk Agreement, Design-Build Agreement, Infrastructure Reimbursement Agreement or Public-Private Development Agreement, all as defined below.
- 2.2 CM at Risk** means is a licensed general contractor that has signed a construction manager at risk agreement as defined in N.C. Gen. Stat. 143-128.1 to manage a construction project for the City. A CM at Risk both manages and guarantees the cost of the project.
- 2.3 CM at Risk Agreement** means the agreement between the CM at Risk and the City, under which the CM at Risk agrees to manage and guarantee the cost of the Project
- 2.4 Design-Build Agreement** means a contract under which the City contracts with a single Business Enterprise for the design, management and construction of a horizontal or vertical construction project
- 2.5 Developer Agreement** is a contract under which the City agrees to provide funding of more than \$200,000 for a "public-private development project" as defined in Section 7-109 of the City of Charlotte Charter. A public-private development project must be a capital project comprising both public and private facilities that are located (i) in the City's central business district, as defined by City Council; (ii) in or along a major transportation corridor; or (iii) in a development zone designated pursuant to G.S. 105-129.3A.
- 2.6 Infrastructure Reimbursement Agreement** means a contract with a private developer or property owner approved by the City under Section 2-2 of Charlotte City Code for the design and construction of municipal infrastructure that is included in the City's capital improvement plan and serves the developer or property owner. Infrastructure Reimbursement Agreements may involve, without limitation, water mains, sanitary sewer lines, lift stations, storm water lines, streets, curb and gutter, sidewalks, traffic control devices and other associated facilities.
- 2.7 Project** means a construction project in connection with which the City enters into an Alternative Construction Agreement.
- **Exemption and Participation Plans for Alternative Construction Agreements.** Alternative Construction Agreements are exempt from Part B of the CBI Program. However, absent an exemption from the Program Manager, the City shall require the party entering into an Alternative Construction Agreement to comply with Section 4 regarding the establishment of SBE and MWBE Goals, as applicable, and to enter into and comply with a Participation Plan for the achievement of such Goals.
  - **MWSBE Requirements for Alternative Construction Agreements.** Unless exempted by the CBI Program Manager, parties that enter into Alternative Construction Agreements with the City (collectively referred to as the "Company") shall comply with the following:

- **Subcontracting Goals.** Prior to City Council's vote to award the Alternative Construction Agreement, the Program Manager and the Company shall negotiate and agree on proposed SBE and MWBE Goals for the Project (collectively, "Subcontracting Goals"). Unless exempted by the Program Manager, Subcontracting Goals shall be established for all design and construction work that the City will pay or reimburse for, and for any other work, services and products provided on the Project that the parties agree to include within the scope of the Subcontracting Goals (collectively, the "Target Work"). The Program Manager may exempt an Alternative Construction Agreement from the requirements of Part G upon finding that the opportunities for SBE and/or MWBE utilization do not warrant Subcontracting Goals or a Participation Plan. The Program Manager shall require MBE and WBE Goals only for those categories of firms, if any, that have experienced ongoing marketplace discrimination that has adversely affected their ability to participate in City Contracts.
- **Participation Plan.** Also prior to City Council's vote to award the Alternative Construction Agreement, the Program Manager and the Company shall negotiate and agree on a proposed Participation Plan that describes what outreach and other efforts the Company will be required to undertake to meet the Subcontracting Goals established for the Project (the "Participation Plan").
- **Council Approval.** The proposed Subcontracting Goals and Participation Plan shall be presented to City Council for approval as part of the Alternative Construction Agreement. Upon approval, they shall be included in the Alternative Construction Agreement when executed.
- **Reporting.** Throughout the duration of the Target Work, the Company shall submit to the City written reports that detail contract award amounts and the actual dollars spent with SBE and/or MWBE firms on the project, broken down by industry, trade and race/gender/ethnic ownership. Such reports shall be in a format approved by the CBI Program Manager and shall contain such information as may be specified by the CBI Program Manager from time to time. The CBI Program Manager may, in his or her sole discretion, authorize the Company to submit such reports on a quarterly rather than monthly basis, provided that such authorization shall be in writing.
- **Mandatory Reference to CBI Program in Agreement.** Each Alternative Construction Agreement (other than those exempted by the CBI Program Manager) shall contain the following provisions, subject to such minor revisions as may be necessary to achieve consistent terminology with the Alternative Construction Agreement:

#### **Section \_\_ CBI Program**

- (a) **CBI Program.** The City has adopted a CBI Program, which is posted on the City's website and available in hard copy form upon request to the City (the "MWSBE Program"). The CBI Program provides opportunities for small, minority and women owned businesses to participate in City funded contracts.
- (b) **Participation Plan.** To promote the objectives of the CBI Program, Company has agreed to comply with the Participation Plan attached to this Agreement as **Exhibit \_\_** and incorporated herein by reference (the "Participation Plan"). Capitalized terms referenced in this Section and not defined in this Agreement are defined in the Participation Plan. Company shall comply with the Participation Plan with respect to all Project Work (as defined below) and shall require all contractors and subcontractors hired for Project Work to comply as well.

The term "Project Work" means [insert description of all design and construction work that the City will pay or reimburse for, and for any other work, services and products provided on the Project that the parties agree to include within the scope of the Subcontracting Goals].

**(c) Subcontracting Goals.** The Company has committed to the following Subcontracting Goals for the Project, which will be calculated as a percentage of all Project Work:

Committed SBE Goal: \_\_\_%

Committed MBE Goal: \_\_\_% (for \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ firms)

Committed WBE Goal: \_\_\_%

**(d) Violations.** A violation of the Participation Plan by Company, or any contractor or subcontractor performing Project Work will constitute a material breach of this Agreement, and will subject Company to the remedies set forth in the Participation Plan, including but not limited to liquidated damages. Company agrees to fully cooperate in any dispute resolution process requested by the City from time to time with respect to potential violations of the Participation Plan, and to promptly provide all documents reasonably requested by the City as relevant to whether the violation occurred.